

THE COMMITTEE TO SAVE ADELPHI, by its Co-Chairs, GAYLE INSLER, DEVIN THORNBURG, RAKESH GUPTA, and CATHY CLEAVER; THE FACULTY SENATE OF ADELPHI UNIVERSITY, by its Chairman, DEVIN THORNBURG; SYLVIA ARON; CRAIG F. ASH; JAMES L. BEDELL; WILLIAM H. BORTEN, CARL B. BUXBAUM; DOMINICK CAVALLO, CATHERINE CLEAVER; BARBARA S. COHEN; DEBORAH COOPERSTEIN; ROBERT J. DEVLIN; PETER P. FARLEY; VALERIE FEINMAN; PATRICIA PREISS-GALLAGHER; RAKESH GUPTA; THOMAS F. HEFFERNAN; MONICA M. HOMER; GAYLE INSLER; ELLEN R. KELLY; PATRICK J. KELLY; STEPHEN I. KLASS; DAVID LUBELL; GAIL B. MALLOY; RACHEL MATHER; LEONARD NADEL; FRANK RICO, JR.; STANLEY SNEGROFF, BROOKE E. SPIRO, DEVIN THORNBURG, MARIE-LOUISE VAZQUEZ; and STANLEY WINDWER,

Petitioners,

- against -

PETER DIAMANDOPOULOS, ERNESTA PROCOPE, PETER GOULANDRIS, JOSEPH CARLINO, NICHOLAS BERGGRUEN, DR. KAREN ELIZABETH BURKE, JAMES T. BYRNE, JR., THOMAS CALABRESE JR., DIMITRI CONTOMINAS, RAYMOND V. DAMADIAN, ROBERT B. FRIEDMAN, DONALD KAGAN, HILTON KRAMER, ABRAHAM KRASNOFF, ELIAS KULUKUNDIS, GEORGE LOIS, LEONARD RIGGIO, NICHOLAS P. SAMIOS, JOHN SILBER and ANGELO SILVERI,

Respondents.

TO: The Honorable the Members of the Board of Regents

I. Procedural History and Allegations.

The subjects of this proceeding are the trustees of Adelphi University ("Adelphi"), a private coeducational institution chartered in 1896 by the New York State Board of Regents. Located in

Garden City, Long Island, New York, Adelphi consists of an undergraduate College of Arts and Sciences, and graduate Schools of Education, Management and Business, Nursing, and Social Work. As a not-for-profit educational corporation chartered by the Regents, Adelphi enjoys certain public benefits, among them, tax exempt status, federal and state support through student financial aid and eligibility for government subsidized financing of capital construction. In recognition of the unique, quasi-public nature of institutions like Adelphi, the Legislature of the State of New York has vested in the Board of Regents the obligation and authority to review the propriety of trustee actions alleged to constitute a neglect of duty, misconduct or failure to carry out the institution's educational purposes. Education Law §226(4). It is such allegations which give rise to this proceeding.

On April 29, 1996, faculty, students and former members of Adelphi's board of trustees commenced this proceeding by filing with the Board of Regents a verified petition seeking the removal from office of trustees Peter Diamandopoulos, Ernesta Procope, Peter Goulandris, Joseph Carlino, Nicholas Berggruen, Dr. Karen Elizabeth Burke, James T. Byrne, Jr., Thomas Calabrese, Jr., George Conklin, Jr., Dimitri Contominas, Raymond W. Damadian, Robert B. Friedman, Charles M. Grace, Dorothy Habben, Donald Kagan, Hilton Kramer, Abraham Krasnoff, Elias Kulukundis, George Lois, Leonard Riggio, Nicholas P. Samios, John Silber, Angelo Silveri, and William Simon. Petitioners allege that the trustees are guilty of neglect of duty, misconduct and failure to carry out the educational purposes of Adelphi because they have:

A. conferred upon Adelphi's president, Peter Diamandopoulos, a compensation package unparalleled among presidents at comparable institutions in the face of plummeting student enrollments, rising tuition and fees, and shrinking student services and course offerings;

B. approved or acquiesced in transactions between Adelphi and companies in which certain trustees have a financial interest, resulting in a personal benefit to such trustees. Specifically:

(1) Trustee Ernesta Procope, current chair of the board, used her position to obtain Adelphi's considerable insurance business for E. G. Bowman, Inc., an insurance brokerage firm in which she has an ownership interest;

(2) Trustee George Lois' advertising firm, LOIS/USA, earned fees from ads he created and placed for Adelphi;

(3) Trustee Joseph Carlino's law firm received over \$100,000 annually in legal fees from Adelphi;

(4) The wife of trustee and former chairman of the board James Byrne, received a \$100,000 per year job while Byrne served on the board.

C. from 1987 through 1995, failed to oversee and prevent serious financial mismanagement in the purchasing of goods and services for Adelphi;

D. failed to oversee the governance of Adelphi and refused to adhere to the Articles of Governance of the University, especially as they pertain to communication with the faculty and tenure determinations;

E. denied publicly all allegations of wrongdoing by the president and various trustees, while simultaneously refusing to investigate such allegations to determine their truth or falsity.

Petitioners claim that these actions warrant the removal of all trustees under Education Law §226(4), and ask that the Regents appoint new trustees in their place.

After a review of the verified petition for legal sufficiency, and pursuant to Education Law §§206 and 226(4), the Board of Regents authorized Chancellor Carl T. Hayden to constitute a panel of three Regents to conduct a hearing on the petition and render a report and recommendation to the full Board of Regents. Chancellor Hayden appointed Vice Chancellor Louise P. Matteoni, Regent J. Edward Meyer and Regent Saul B. Cohen, to serve on the panel (collectively the "panel"), and designated Regent Meyer as chair.

Chairman Meyer held a pre-hearing conference with counsel to the parties on June 24, 1996 to address various procedural matters, including the hearing schedule. By order dated June 25, 1996 Chairman Meyer directed that the hearing begin on July 29, 1996 at the offices of the New York State Education Department at One Park Avenue, New York, New York. The order also provided for the dismissal of all claims against respondents Simon, Habben, Conklin and Grace, who were no longer trustees. Counsel to respondent trustees, Paul, Hastings, Janofsky & Walker, stipulated that delivery of a copy of such order to counsel would constitute sufficient notice to respondent trustees under Education Law §226(4).

Pursuant to a subsequent order of Chairman Meyer dated July 18, 1996, petitioners were granted leave to file an amended verified petition (the "petition"). The petition added certain individual petitioners and omitted Simon, Habben, Conklin and Grace as respondents. On February 6, 1996, trustee Berggruen resigned from the board. Ex. R-VV.⁽¹⁾ Petitioners voluntarily dismissed with prejudice the conflict of interest claims against trustees Calabrese and Friedman. Tr. 2876, Ex. R-31M.

After a one-day adjournment granted at the request of counsel, the hearing began on July 30, 1996, and continued over 27 days, concluding on November 20, 1996.⁽²⁾ The panel heard the testimony of 28 witnesses and received into evidence hundreds of exhibits. The testimony was contemporaneously transcribed by a stenographer and made available to the parties, the panel and the full Board of Regents.

This report and recommendation is based on the panel's careful consideration of the petition, the answer thereto, the pre-hearing memoranda of law, arguments of counsel, the exhibits submitted by the parties, the testimony of the witnesses, the post-hearing memoranda of law and the applicable statutory and case law. We will address each of petitioners' claims seriatim.

II. The President's Compensation.

A. Compensation Chronology

1. The Initial Agreement: 1985-1986

Peter Diamandopoulos ("Diamandopoulos") became president of Adelphi in July 1985. Tr. 120. Pursuant to Article III, §2 of the Adelphi Bylaws, since his appointment, Diamandopoulos has also served as a full voting member of the board of trustees. Tr. 121-122; Exs. P-1, 2.

Diamandopoulos' initial employment agreement was negotiated over the telephone by then vice-chairman of the board James Byrne ("Byrne"). It was for a five-year term, Tr. 129, 5110, 5134, 5135, Ex. P-4, and provided for an annual salary of \$95,000 and a TIAA-CREF contribution by Adelphi to Diamandopoulos' account of 13% of Diamandopoulos' salary. Tr. 131, 5135, 5136. Pursuant to the agreement, Diamandopoulos was also provided with University housing at 55 Brompton Road, Garden City, free of cost, which he was required to live in, Tr. 131, 5112; the use of a car owned or leased by the University, Tr. 5112; life insurance coverage in the amount of \$500,000, making Diamandopoulos' designees the beneficiaries, Tr. 2809, 5112, Ex. P-4; reimbursement for domestic travel, Tr. 142, 143; stipends of approximately \$5,000 and \$12,000 to cover household expenses and household help, respectively, Tr. 132-134, 5112; and reimbursement of all reasonable and necessary expenses incurred by Diamandopoulos in the performance of his duties. Ex. P-4. "Reasonableness" was unilaterally determined by Diamandopoulos, in his sole discretion. Tr. 1213-1214. Once Diamandopoulos incurred an expense, he would automatically receive reimbursement, Tr. 5482, as long as he submitted documentation to Adelphi's treasurer reflecting that the expense was, in fact, incurred. Tr. 395, 1480. While the agreement provided that a budget would be established for Diamandopoulos' expenses, none ever was. Tr. 5480. Adelphi's treasurer, Catherine Hennessy ("Hennessy"), testified that Adelphi's records were not maintained at a level of detail that would enable her to

distinguish Diamandopoulos' expenses from those of other administrators. Tr. 1493, 1495-1499. Finally, the agreement provided for an automatic renewal at the end of two years. Tr. 5138. The full board of trustees did not review or approve this initial employment agreement, leaving the matter to Byrne to handle. Tr. 5111.

2. The First Increase: 1986-1987

Even though the original agreement did not call for a review of his contract until June 30, 1987, Diamandopoulos asked Byrne to accelerate the review "for the purpose of determining the fairness of [Diamandopoulos'] salary." Ex. R-29M. In September 1986, Byrne, who in the intervening months had ascended to the position of chairman of the board, selected trustees John Phelan ("Phelan") and Ernesta Procope ("Procope") to advise him on Diamandopoulos' compensation package. Tr. 801-802, 5165-5167, 5169. This marked the beginning of a practice Byrne would follow throughout the course of his chairmanship: the unilateral creation of an ad hoc group of three trustees to annually review Diamandopoulos' remuneration. Tr. 5114.

Byrne wrote to Phelan and Procope, reminding them of the terms of Diamandopoulos' agreement, and provided them with a copy of the 1985-1986 College and University Personnel Association ("CUPA") Administrative Compensation Survey. Ex. R-29M. This document listed the salaries of chief executive officers of higher education institutions classified by "institutional type" and had been given to Byrne by Diamandopoulos. Tr. 5167-5168. Byrne told Phelan and Procope that he believed an "adjustment" to Diamandopoulos' compensation was "in order," and suggested a "base salary in the range of \$125,000, with all other arrangements remaining as is." Ex. R-29M.

Phelan and Procope responded by recommending a \$50,000 salary increase, to \$145,000 annually, and suggested an annual review of Diamandopoulos' compensation to "keep (Diamandopoulos') salary and benefits up-to-date." Tr. 802-803; Ex. P-5. While Phelan and Procope indicated in conclusory terms that Diamandopoulos had performed "extraordinarily well," Ex. P-5, there is no evidence in the record that they or any trustee actually evaluated Diamandopoulos' performance against articulated goals or benchmarks. Tr. 804. Indeed, Byrne admitted that, while he was chairman of the board (1985-1992), the board never conducted a structured, formal evaluation of Diamandopoulos' performance. Tr. 5115. Nor did the board articulate any performance expectations or measures. *Id.*; Tr. 1329-1330. Rather, Byrne says that he relied on his personal contacts with Diamandopoulos and Diamandopoulos' interactions with other trustees to gauge performance. Tr. 5117.

Byrne accepted the salary recommendation of Phelan and Procope, even though it was \$20,000 over Byrne's suggested "range", and their proposal that Diamandopoulos' compensation be reviewed annually. Tr. 5175. Byrne wrote to Diamandopoulos on November 13, 1986, setting his new salary at \$145,000, and also unilaterally raising Adelphi's TIAA/CREF contribution to 15% of Diamandopoulos' salary, even though Phelan and Procope had made no such

recommendation. Tr. 154-155, 163, 5175; Ex. P-6. The board of trustees neither reviewed nor approved this compensation package. Rather, it left this decision to Byrne as chairman of the board, just as it would throughout his chairmanship. Tr. 5120-5121, 5123. While Byrne claims to have at least reported the results of Diamandopoulos' contract negotiations to the full board of trustees, there is no corroborative evidence in the record -- either testimonial or documentary -- that he did so. Diamandopoulos testified that if his compensation was discussed at any board meeting or executive session, a reference would appear in the minutes. Tr. 159, 162. Carol Sabino, the board secretary who was responsible for taking board minutes, agreed. She testified that she recorded all votes taken by the board, identified those present at the meeting, and noted when executive sessions were held. Tr. 3974-3975, 3984-3985. While Ms. Sabino did not become secretary until 1992, she followed the same practices as her predecessor. Tr. 3968-3969. Finally, counsel to the trustees represented at the hearing that all minutes referring to Diamandopoulos' compensation had been produced to this panel, ensuring a complete record. Tr. 463. However, the minutes from 1985 through 1992 do not describe Diamandopoulos' compensation or even indicate that the subject was discussed in executive session.

3. The Second Increase and the Severance Package: 1987-1988

In June 1987, Byrne again asked Procope, together with trustee George Andreas ("Andreas"), to review Diamandopoulos' compensation package for the academic year 1987-1988. Tr. 5177; Exs. R-29S and R-29T. Andreas had been recruited to the board by Diamandopoulos just four months earlier. Tr. 5493. Procope wrote to Byrne, asking for his thoughts and recommendations. Ex. R-29V. During a subsequent phone conversation, Procope and Byrne talked generally about salary ranges, and the concept of deferred compensation. Tr. 5181. There are no notes or minutes of this conversation, and Andreas did not participate.

Andreas and Procope met with Diamandopoulos on June 25, 1987 to discuss his compensation, Tr. 5184; Ex. R-29V, and while we do not know the content of that conversation, they apparently did not ask Diamandopoulos to evaluate his own performance. Tr. 819. Nor did they measure Diamandopoulos' performance against goals or objectives. Tr. 804, 1329-1330. Nevertheless, they recommended to Byrne that Diamandopoulos' salary be raised \$30,000, to \$175,000 annually; that Adelphi's TIAA/CREF contribution be increased from 15% to 18%; and that Diamandopoulos' term life insurance be increased to \$750,000. Tr. 166, 171, 5184-5185; Ex. R-29V. The salary recommendation was based in part on a June/July 1987 Newsletter of the Association of Governing Boards, which indicated that salaries of presidents of institutions allegedly comparable to Adelphi were in the range of \$111,000 to \$119,000. Tr. 5183-5184, 5198; Ex. R-29W. Procope and Andreas also recommended a deferred compensation package, to which Byrne agreed. The package provided for annual Adelphi contributions of \$50,000 over ten years, vesting in increments over the last five years. In no event was its value to exceed \$500,000 in 1987 dollars. Tr. 166, 5193-5197, Exs. R-29Y and R-29Z. Both Byrne and Procope viewed the severance package as "golden handcuffs", even though Diamandopoulos was only two years into his tenure and had not indicated an intent to leave Adelphi. Tr. 813-815, 5188. By letter dated July 14, 1987, Diamandopoulos was informed of the new compensation package and the extension of his agreement for two more years until 1992. Ex. P-7. Once again, the full board did

not review or approve the terms of this agreement.

4. The Third Increase: 1988-1989

On or about June 27, 1988, Byrne again asked Andreas and Procope to review Diamandopoulos' salary, this time for academic year 1988-1989. Tr. 5213, 5221; Ex. R-30-D. While Byrne suggested Diamandopoulos' salary remain flat, Andreas and Procope recommended a \$12,000 increase, to \$187,000 annually. Tr. 5218- 5219. Based upon their recommendation, Diamandopoulos' salary was, indeed, raised to \$187,000, and the contract extended. Tr. 173, 5220; Ex. P-8. This time, however, the ad hoc group did not review comparable salaries prior to setting Diamandopoulos'. Tr. 5233. Indeed, Byrne testified that he stopped making such comparisons, because the CUPA information did not reflect salaries of senior administrators. Tr. 5232-5233, 5243-5244, 5511. However, Byrne conceded under oath that comparable salaries of senior administrators were available from other sources, Tr. 5511-5513, and, contrary to Byrne's assertion, the CUPA survey had broken down figures by length of service. Ex. R-30I, p. 63. Once again, the board of trustees played no part in the compensation decision, nor did it review or approve it.

5. The Fourth Increase: 1989-1990

For academic year 1989-1990, Byrne asked Procope and trustee Thomas Macioce ("Macioce") to review Diamandopoulos' compensation. Tr. 5225. Procope and Macioce recommended a raise of \$28,000 to \$215,000. Tr. 821, 5225. Byrne accepted their recommendation. Ex. P-10. For the second consecutive year, no comparable salaries were examined. Tr. 5233. Nor was a formal evaluation process used. Rather, Byrne gave Diamandopoulos his fourth increase in as many years based upon his general impressions of Diamandopoulos' accomplishments. Tr. 5229, Ex. R-30E. These general impressions were not discussed with the board. Rather, in keeping with past practice, the board of trustees neither reviewed Diamandopoulos' performance nor approved the compensation package.

6. The Fifth Increase: 1990-1991

For the 1990-1991 academic year, Byrne directed Procope and trustee Joseph Carlino ("Carlino") to review Diamandopoulos' compensation. Tr. 5242-5243. This time, Diamandopoulos was awarded a one-time lump sum bonus of \$25,000, for a combined base salary and bonus of \$240,000. Tr. 179, 833, 5235, 5242. His employment agreement was also extended to June 30, 1995. Ex. P-11. Again, the ad hoc group did not review comparables, evaluate Diamandopoulos' performance or ask Diamandopoulos to analyze his own accomplishments. Tr. 832-835, 5232-5233. The board of trustees did not review, approve or even familiarize itself with the terms of

the new compensation package.

7. The Sixth Increase: 1991-1992

With the 1991-1992 academic year approaching, Byrne undertook another review of Diamandopoulos' compensation. Once more, Procope and Carlino were asked to serve. Tr. 5242-5243. While Byrne apparently had in his possession the 1991 CUPA compensation survey, he did not share it with Procope or Carlino, nor did he rely on it in setting Diamandopoulos' compensation. Tr. 5233, 5244; Ex. R-30G. Procope and Carlino recommended that Diamandopoulos' salary be raised by \$35,000, to \$250,000. Tr. 189; Ex. P-13. The agreement was also extended to June 30, 1996. Id. On June 11, 1991, Diamandopoulos clarified by letter certain terms of the severance agreement, including its vesting on June 30, 1997 and Adelphi's assumption of any taxes that might be assessed. Tr. 194; Ex. P-12. This clarification was accepted by Byrne. Neither it nor the compensation package was considered or approved by the board.

8. The Seventh Increase: 1992-1993

In August 1992, Byrne again awarded Diamandopoulos a one-time lump sum payment of \$25,000, based upon the recommendation of Procope and Carlino, and extended Diamandopoulos' contract to June 30, 1997. Accordingly, in 1992-1993, Diamandopoulos earned a salary including bonus of \$275,000. Ex. P-14. The board did not review or approve this raise. Nor did it evaluate Diamandopoulos' performance.

9. The Eighth Increase, the Sabbatical, the Amended Severance Package and the Option Contract: 1993-1994

In September 1993, there was a change in board leadership. Procope, who had recommended each of Diamandopoulos' salary increases, was elected chairwoman of the board. Ex. P-355, 735. Procope unilaterally created an executive compensation committee (the "committee") to determine Diamandopoulos' compensation. Tr. 793, 837. Procope appointed trustee Peter Goulandris ("Goulandris"), recruited by Diamandopoulos in 1992, as committee chairman, Tr. 2314, 2320, and trustees Abraham Krasnoff ("Krasnoff"), John Silber ("Silber") and Carlino as members. Tr. 796-799, 2327. Due to illness, Carlino did not play an active role on the committee. Tr. 2327. Procope did not give the committee a written charge, Tr. 800, 2321, nor was it provided with guidelines. Tr. 847. Instead, she told the committee to "look at what Diamandopoulos had accomplished over the year, and examine his relationship with students." Tr. 799, 2321.

Rather than the customary August review of his compensation package, the committee did not review Diamandopoulos' compensation for the academic year 1993-1994 until March 1994. Again, the committee did not prepare written or formal evaluations of Diamandopoulos' performance, measure his effectiveness against established benchmarks, or make any attempt to compare salaries of presidents at comparable institutions. Tr. 1607, 1818, 2327-2328,

2344, 2615, 6693.⁽³⁾ Nevertheless, the committee added several significant components to the package, after discussing and agreeing to them by telephone. Tr. 2328, 2329.

First, it recommended raising Diamandopoulos' base salary of \$250,000 by \$50,000, to \$300,000, and providing for an automatic annual 5% salary increase. Tr. 198-199, Ex. P-18. Next, it recommended increasing the rate at which Adelphi contributed to the deferred compensation plan from \$50,000 annually to 30% of Diamandopoulos' base salary (or \$90,000 starting in academic year 1993-1994, an increase in one year of \$40,000). *Id.* The committee further recommended that Diamandopoulos be provided a retroactive right to "sabbatical leave at the rate of 1/6 of a year's salary for every year of service commencing July 1, 1985." Ex. P-18. In what Diamandopoulos, Byrne, and trustee Donald Kagan ("Kagan") conceded was an unusual arrangement, the committee also recommended that in the event of Diamandopoulos' death, his estate would receive the amount of the earned sabbatical. *Id.* Tr. 591, 1604, 6040, 6041. Further, the committee recommended that Diamandopoulos be given an option to purchase a University-owned apartment at East 72nd Street, New York, N.Y., together with improvements and furnishings provided at University expense, for the price of \$905,000, with \$5,000 down to secure the option. Ex. P-18. Adelphi had purchased this apartment approximately 10 months earlier for \$1.15 million, Tr. 308-309, and it had been appraised only six months earlier at \$1.05 million. Ex. P-220. Finally, the University formally agreed to pay for a \$1 million valuable items insurance policy covering Diamandopoulos' personal jewelry and art collection. Tr. 200-201; Ex. P-18. Unbeknownst to the board, Adelphi had actually been paying for such a policy since February 1990. Tr. 204. The arrangement was not committed to writing, however, until March 1994. Tr. 205.

Once the committee unanimously approved these changes, Goulandris asked Diamandopoulos to have draft agreements prepared for the committee's review and signature. Tr. 2329, 2353. Three contracts were drafted by Diamandopoulos' attorney, Tr. 869-873, and delivered to Goulandris, who alone reviewed and approved them. Tr. 2355. No attorney reviewed these documents on behalf of Adelphi. Tr. 1405, 2356. Goulandris forwarded the contracts to chairwoman Procope and Diamandopoulos' secretary simultaneously. Tr. 2356, 2358; Ex. P-15.

At the March 2, 1994 meeting of the board of trustees, Goulandris reported that he had reviewed and discussed with Diamandopoulos a new "employment/separation contract." Exs. P-16, P-145. He did not mention the "option" to purchase. *Id.* He noted that the committee unanimously endorsed the agreement. For the first time since Diamandopoulos had become president in 1985, the full board was asked to approve his compensation arrangement: we "now request the board to authorize the chairman to implement presidential employment contract." *Id.* However, there is no

indication in the minutes that the details or even the substance of the contracts were shared with the board. To the contrary, Goulandris himself testified that he was "uncertain" whether the specifics of the compensation arrangement were discussed, Tr. 2358, and that he merely described the terms as "mutually satisfactory." Tr. 2361-2364. Goulandris acknowledged that board members were not furnished with copies of the new employment contract, the separation agreement or the option contract. Tr. 2362-2363. Krasnoff concurred. Tr. 6697. Rather, Goulandris simply told the trustees that the package was for a five year term, and weighted toward deferred compensation. Tr. 2361-2362. None of the trustees asked any questions, and the resolution authorizing chairwoman Procope to execute the recommendations of the committee was unanimously passed by voice vote. Tr. 2364; Ex. P-16. The board minutes indicate that Diamandopoulos was present and did not recuse himself from the vote. *Id.* Procope formally advised Diamandopoulos of his new compensation package by letter dated March 3, 1994. Like the agreements themselves, this letter was also drafted (for Procope) by Diamandopoulos' attorney. Tr. 875-877; Ex. P-17. Attached to the letter were executed copies of the employment agreement (Ex. P-18), the separation agreement (Ex. P-19), and the option to purchase agreement (Ex. P-33). No attorney reviewed these agreements on Adelphi's behalf.

10. The Ninth Increase: 1994-1995

In July 1994, Diamandopoulos received the automatic 5% salary increase guaranteed by the 1994 contract, raising his base salary to \$315,000. Tr. 235. There is no evidence that the board reviewed Diamandopoulos' performance before this raise.

11. The Tenth Increase: 1995-1996

One year later, in July 1995, Diamandopoulos received another automatic 5% increase, elevating his base salary for the 1995-1996 academic year to \$330,750. Tr. 236; Ex. P-22. In addition, the committee, during a June 7, 1995 telephone conference call among its members, agreed to extend Diamandopoulos' contract to June 30, 2000, increase Diamandopoulos' life insurance coverage to \$1.25 million, and reimburse Diamandopoulos for any taxes he might be required to pay as a result of the University's payment of Diamandopoulos' insurance premiums. Tr. 6684; Ex. P-21.⁽⁴⁾ The committee did not evaluate Diamandopoulos' performance or gather comparable salary data before acting. Tr. 2615. Goulandris did not share the details of this agreement with the full board, nor did he seek its authorization this time. Rather, he merely reported at the September 27, 1995 meeting that "the executive compensation committee addressed, via a telephone conference call, one or two issues that had to do with the President's compensation. These issues were settled in a fashion satisfactory to ourselves and the President." Ex. P-20. Procope confirmed that the board of trustees did not review or approve the compensation package because the committee had "resolved the matter." Tr. 1024.

12. The Board Approves Diamandopoulos' Compensation Retroactive to 1994

On June 19, 1996, subsequent to the filing of the petition herein and the commencement by the State's Attorney General of an investigation of Adelphi, the committee issued a report to the full board on Diamandopoulos' compensation (the "report"). Ex. P-82. The report quantifies the increments in the president's base salary, beginning in 1985. It also describes various components of Diamandopoulos' compensation package, including sabbatical, severance and the option to purchase the apartment at East 72nd Street. Notably, the report incorrectly states that Diamandopoulos may only exercise the option to purchase upon his retirement. The report attempts to construct an after-the-fact evaluation of Diamandopoulos' accomplishments, and concludes by recommending that the full board "reconfirm in light of these facts its approvals on March 2, 1994, June 7, 1994, June 7, 1995 and September 27, 1995 of this compensation package." Id. at 6. It does not seek ratification of Diamandopoulos' compensation packages prior to 1994. Id. At the full board meeting on June 19, the board resolved to "accept the recommendations of the Report." Ex. R-31Q.

B. The Value of Diamandopoulos' Compensation Package

During his ten year presidency, Diamandopoulos' base salary has risen from \$95,000 to \$330,750, an average annual increase of \$23,500; Adelphi's annual TIAA/CREF contribution to Diamandopoulos' retirement account has increased from \$12,350 in 1985 to \$59,535 in 1995; and Adelphi's annual payments toward Diamandopoulos' deferred compensation have increased from \$50,000 to \$99,225. Ex. P-278. While the petitioners and the trustees disagree on the precise value of Diamandopoulos' compensation package, our calculations show that, for the 1995-1996 academic year, the approximate cost to the University of Diamandopoulos' employment was:

Base Salary

(payroll taxes not included)

(Exs. P-278, R-30Q)

\$330,750

TIAA/CREF

(18% of base salary)

(Ex. P-278)

\$59,535

Sabbatical

(1/6 of current base salary)

(Ex. P-287)

\$55,125

Rental Value - 55 Brompton

(Ex. R-29M)

\$36,000

Operating Costs - 55 Brompton

(Ex. P-287)

\$64,420

Rental Value - Manhattan Apt.

(Ex. R-21A)

\$106,090

Operating Costs - Manhattan Apt.

(Ex. P-287)

\$38,804

Value of Tax Reimbursement for Taxes on Residence

(Exs. P-287, R-30Q)

\$14,715

Auto Use

(Exs. P-93, 287)

\$8,599

Insurance Cost

(latest available: 1994-1995)

(Ex. P-287)

\$23,850

Deferred Compensation at 30% of Salary

(Ex. P-278)

\$99,225

TOTAL \$837,113

Had Diamandopoulos elected to retire at the end of the 1995-1996

academic year, the University would have provided him with benefits of approximately:

Profit on Manhattan Apt.

(Ex. P-287)

\$245,000

Value of Manhattan Apt. furnishings/improvements

(Ex. P-287)

\$190,000

Accumulated TIAA/CREF Contributions

(Ex. P-278)

\$436,895*

Accumulated Deferred Compensation

(Ex. P-278)

\$583,725

Accumulated, Unused Sabbatical

(Ex. P-287)

\$606,375

TOTAL \$2,061,995

*\$184,850 actually paid to TIAA/CREF; \$252,045 paid to "bookkeeping" account; Diamandopoulos directs how the "unfunded" amount in the bookkeeping account is invested. Tr. 252-257.

This analysis does not include the value of interest earned on contributions made to Diamandopoulos' pension accounts.

C. The Applicable Law

Several principles of law apply to our review of Diamandopoulos' compensation package. Section 202(a)(12) of the Not-for-Profit Corporation Law ("N-PCL") provides that a not-for-profit corporation like Adelphi has the power to:

[E]lect or appoint officers, employees and other agents of the corporation, define their duties, fix their reasonable compensation and the reasonable compensation of directors, and to indemnify corporate personnel. Such compensation shall be commensurate with services performed. (emphasis supplied)⁽⁵⁾

The legislative history of this provision has particular relevance to Adelphi. The former General Corporation Law simply granted all corporations the power to appoint officers and fix their compensation. Gen. Corp. Law §14(4); 7 White on New York Corporations, ¶713.02 (Prunty 1996). This provision was carried into the Business Corporation Law (which applies only to business corporations) without change. Bus. Corp. Law §202(a)(10). In the N-PCL, however, the Legislature purposefully inserted the word "reasonable" before "compensation," and added the sentence mandating that compensation be "commensurate with services performed." As a leading authority on New York corporate law states: "The clear implication is that legislators are less tolerant of excessive compensation in the nonprofit area than they are in the business community." 6 White on New York Corporations, supra, ¶202.04. Thus, courts, along with corporate directors, must take a more careful look at compensation in the not-for-profit corporation area. 7 White on New York Corporations, supra, at ¶713.02.

In setting reasonable compensation, trustees must be guided by their fiduciary duty of due care to the institution. This duty requires a director to:

use the "care that an ordinarily prudent person would exercise in a like position and under similar circumstances."

D. Kurtz, Board Liability, 21 (1988). The duty of care for directors of New York not-for-profit corporations is codified at §717(a) of the N-PCL:

Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.

The degree of care owed by the trustees in this case must also be viewed in the context of Adelphi's special status among corporations. While Adelphi is a private, not-for-profit corporation, as set forth above at page 1, supra, it also possesses many characteristics of a public trust (tax exempt status, federal and state student financial aid, and eligibility for government subsidized capital construction). Indeed, Vice Chairman Goulandris acknowledged that Adelphi's quasi-public status imposes upon the trustees a "heavy responsibility." Tr. 2791-2793. White's treatise argues for a high standard of care in those corporations closest to the public interest: "[W]e have every right to expect the best from those who assume responsibility for our institutions devoted to education and health care." 7 White on New York Corporations, supra, ¶717.01.

In setting the compensation of their officers, not-for-profit trustees also have the benefit of the "business judgment rule," which bars a substantive review of the merits of their decisions, as long as they have acted in good faith, with due care and in the absence of self-dealing. See, 7 White on New York Corporations, supra, at ¶717.01; see also, Brodsky & Adamski, Law of Corporate Officers and Directors - Rights, Duties and Liabilities, §2:06 (Callaghan 1995); S. H. and Helen R. Scheuer Family Foundation, Inc. v. 61 Associates, et al., 179 A.D. 2d 65, 69 (1st Dept 1992). Where these circumstances exist, trustees are not liable for mere errors in judgment and cannot be second-guessed through application of hindsight. See, 7 White on New York Corporations, supra, at ¶717.01; Casey v. Woodruff, et al., 49 N.Y.S. 2d 625, 643 (Sup. Ct. 1944). Although the trustees have not cited any case law in which a New York court has specifically applied the business judgment rule to trustees of education corporations, presumptively the rule would apply to an education corporation just as to any other not-for-profit corporation.

The business judgment rule, however, is not absolute. It does not shield from scrutiny an irrational decision based upon inadequate information or consideration. For the rule to pertain, trustees must affirmatively exercise discretion and make a deliberate judgment. See, Brodsky & Adamski, supra, at §2:06. Nor does it apply if there has been self-dealing. Id. The rule governs only where the decision making, though perhaps misguided, has been honest and disinterested. As the Court of Appeals held, "the rule shields the deliberations and conclusions of the...board only if [it] possess[es] a disinterested independence and [does] not stand in a dual relation which prevents an unprejudicial exercise of judgment." Auerbach, et al. v. Bennett, et al., 47 N.Y. 2d 619, 631 (1979). Finally, the rule does not prevent a review of trustees' actions if the trustees have failed to act with the degree of care required by N-PCL §717. Alpert v. 28 Williams St.

Corp., 63 N.Y.2d 554 (1984).

D. Analysis of the Compensation Decisions: The Failure to Exercise Due Care

The totality of the record before us demonstrates that, in setting Diamandopoulos' compensation, the trustees failed to exercise the degree of care and skill that ordinarily prudent persons would have exercised in like circumstances. They must therefore be removed from office.

This finding rests on two separate but related grounds. First, the board failed in its duty to make informed decisions about Diamandopoulos' compensation. This is evidenced by the board's failure to review or approve the terms of Diamandopoulos' compensation, gather comparable salary data, engage in any meaningful evaluation of Diamandopoulos' performance or educate itself about the specific terms of Diamandopoulos' package. These failures guaranteed arbitrary decisions and amounted to a neglect of the board's fiduciary duty of care. See Hanson Trust PLC, HSCM Industries Inc. v. ML SCM Acquisition Inc., 781 F.2d 264 (2d Cir. 1986). (subsection 1, infra). Second, the board neglected its duty of due care by awarding to Diamandopoulos from 1993-1996 compensation not commensurate with his performance. Id. (subsection 2, infra).

1. Failure to Make Informed Decisions.

a. No Board Review or Approval of

Diamandopoulos' Compensation

The pertinent provisions of the N-PCL and the Adelphi Bylaws impose three obligations on the Adelphi corporate board with respect to the President's compensation. The board must (1) fix the president's compensation; (2) review it annually; and (3) vote its approval. N-PCL §715(f) provides, in pertinent part, that "the fixing of salaries of officers, if not done in or pursuant to the bylaws, shall require the affirmative vote of a majority of the entire board" (emphasis supplied). Adelphi's Bylaws neither fix the President's compensation nor provide an alternative to full board approval. Thus, the "entire" board of trustees must fix Diamandopoulos' compensation by majority vote. The Bylaws further provide that "the Board shall...approve annually terms and conditions of employment, salary policies,...for... administrative officers." Article II, section 3(9).

The record demonstrates that with the exception of the eighth increase in 1994, the Adelphi board never fixed or approved Diamandopoulos' compensation. Rather, from 1986 to 1992, chairman Byrne appointed an ad hoc group to decide Diamandopoulos' compensation. The group recommended a compensation package, which was then approved by Byrne, but never discussed

or acted upon by the full board of trustees. Indeed, Byrne admitted that the board felt the matter was best left to him, as chair. During Procope's tenure as chair, the board approved Diamandopoulos' compensation package only once, in March 1994. In every other instance while Procope was chair, Diamandopoulos' compensation was set by an executive compensation committee, never by the entire board of trustees. On the single occasion when the full board approved Diamandopoulos' "salary/separation agreement," those board members not on the compensation committee had no idea what it contained. Byrne, Procope and Goulandris testified that the trustees were not told the substance of Diamandopoulos' compensation, nor were they provided with copies of the agreements, unless they asked. None of them did. This failure to act in a manner consistent with N-PCL and the Bylaws amounted to a neglect of the board's duty of care. Even in the absence of these statutory and bylaw requirements, an ordinarily prudent trustee would have ensured that he or she was at least familiar with the substance of the agreements, if not their specific terms, before voting to approve them.⁽⁶⁾

b. No Comparable Salary Data.

Even those select individuals to whom the board improperly delegated their decision making authority failed to exercise proper care in setting Diamandopoulos' compensation.⁽⁷⁾ The record shows that the members of the ad hoc groups of 1986-1992 and the subsequently convened executive compensation committee failed to gather information that would have enabled them to make informed, prudent decisions concerning Diamandopoulos' compensation. This failure constitutes a neglect of the duty of care.

From academic years 1988-89 through 1995-96 the trustees involved in setting Diamandopoulos' compensation made no reasonable effort to learn about presidential compensation packages at comparable universities. Tr. 6693. Indeed, since none of the trustees, save Silber, knew anything about setting the compensation of college presidents, it was critical that they obtain comparable salary information to provide a framework for their discussions. This information could have come from any one of a number of sources, including the CUPA survey or other reliable and publicly available references.

However, there is no evidence that the trustees accessed any resource, relying instead on their own individual experiences as businessmen and women in corporate America. Indeed, Procope (insurance), Carlino (law), Goulandris (shipping), Andreas (sales), Phelan (stock market) and Krasnoff (manufacturing) all came from the private business community. Procope explained her appointments of Goulandris and Krasnoff to the executive compensation committee by saying that Goulandris is a businessman who has run his own shipping company for many years and that Krasnoff is a retired businessman from Long Island who knows how to make a payroll. Tr. 797-798. In our view, any business experience these trustees may have gained in setting compensation in the corporate world was necessarily of limited value in setting the compensation of a college president, and should have been augmented by more pertinent information from academia. Tr. 797-799. Goulandris himself conceded this point by saying that a University

president simply does not get paid as much as a comparable businessman. Tr. 2786. In 1994, only Silber had salary information from academia. However, he did not consider it comparable, nor did he share it with other members of the committee. Tr. 1607, 1777, 1818.

We find that, reasonably prudent trustees exercising due care under these particular circumstances would have ensured that they had adequate salary and benefits data from comparable universities to inform their decisions about Diamandopoulos' remuneration. Indeed, Byrne's use of such data in 1985 and 1986-1987 demonstrates its value to the decision making process.

c. No Performance Data.

Moreover, the small core of trustees who set Diamandopoulos' compensation from 1986-1995 generously increased it every year without ever having a clear picture of Diamandopoulos' value. The record shows that these trustees continued to raise Diamandopoulos' compensation in the absence of information that would have enabled them to meaningfully evaluate his performance. In fact, the annual "review" of Diamandopoulos seems to have focused entirely on increasing Diamandopoulos' remuneration, without any real assessment of accomplishments. This is evidenced by the fact that the Adelphi board never had in place a formal or structured evaluation process. Tr. 851, 1410, 5115-5116. Nor did it ever articulate expectations or goals against which Diamandopoulos' performance were measured. Tr. 821, 1330. While a few trustees professed to have a "general idea" of how Diamandopoulos was performing, the matter was never discussed at full board meetings, or even during conversations among the trustees setting Diamandopoulos' salary. Further, the board never asked Diamandopoulos for a self-assessment, a common practice in both the academic and business communities.

We find unpersuasive the only evidence that might lend any support to the trustees' post hoc claim that they actually evaluated Diamandopoulos before setting his compensation. During the Byrne years, the ad hoc "group of three" purported to "evaluate" Diamandopoulos based upon the information they gathered from their personal contacts with him. Tr. 5115-5118. According to Byrne, this information included the year-end oral report that Diamandopoulos gave the board at its annual meeting in June. Tr. 5123. However, we find this information of limited use to trustees engaged in a serious examination of the effectiveness of their president, as it was completely lacking in any hard data or evidence. To the contrary, a review of the record shows that Diamandopoulos' reports were self-congratulatory in tone, replete with sweeping claims of accomplishments and devoid of any real critique of performance. For example, at the beginning of his ninth year, Diamandopoulos reported:

All in all, superintending the academy, telling the students that I love them, interpreting the whole thing to the village, the nation, I am committing myself, and am seeking your involvement and support, and I am very, very upbeat that beginning with commencement we are starting a

new era, my ninth year as your president, and we are now making in earnest pursuing our goal to [sic] making Adelphi University a truly distinctive institution.

Ex. P-76. At the board meeting in Athens, Greece in June 1994, Diamandopoulos reported:

Comparing our university today with what it used to be, the two states of the institution are really incomparable. In all respects, the fundamental strategy declared during my first year to transform the university and make it an educationally serious university is coming to a close after ten years of hard work.

(emphasis in original). Ex. P-142. Diamandopoulos did not describe how the University had been "transformed," or the facts supporting his claim of "educational seriousness." We find that these "reports" did not provide the trustees with the kind of objective information upon which a reasonably prudent trustee should rely in deciding whether to commit more of Adelphi's dollars to the salary of its chief executive officer, especially in light of the documented shortcomings of Diamandopoulos' record (see, pp. 26-32, infra).

d. Diamandopoulos' Apartment Option.

Examination of specific components of Diamandopoulos' compensation package further illustrates the board's utter failure to exercise due care in setting Diamandopoulos' compensation. The most egregious example involves the board's acquisition of an apartment at East 72nd Street and its subsequent grant to Diamandopoulos of an option to purchase that apartment. In 1990, the board authorized the President to lease an apartment in New York City on East 85th Street for development purposes. Ex. P-24. The apartment was to provide Diamandopoulos a base of operations from which he could be more "visible". There, Diamandopoulos could more effectively cultivate benefactors and recruit potential trustees. Tr. 181, 185, 5513. After leasing the apartment for three years, the board on May 5, 1993 authorized Diamandopoulos to purchase an apartment in New York City for the same purpose. Tr. 845. Ex. P-25. This authorization was based upon Diamandopoulos' recommendation to the finance committee that Adelphi should spend \$2 million on four real estate acquisitions, including a NYC apartment. Tr. 269-270, 283; Ex. P-74. Procope testified that it was important for Adelphi to have such a "Manhattan presence" for development activities. Tr. 839. Goulandris further testified that the board wanted Adelphi to "have an ongoing presence and the right sort of presence in New York City" and that Garden City did "not provide the right sort of platform" for Adelphi to expand in the proper way. Tr. 2315-2319. Establishing a Manhattan base from which Diamandopoulos could expand Adelphi's development activities was especially important in light of Adelphi's miniscule

endowment and 90% dependence on tuition and fees. Ex. R-14S. Goulandris also stated, that in addition to providing Diamandopoulos with a Manhattan base, the property was acquired with the hope that it would increase in value to Adelphi. Tr. 2318.

However, the trustees had no idea whether it made good economic sense to purchase rather than continue to lease an apartment, because they gathered no information about how frequently Diamandopoulos had used the leased apartment at East 85th Street. Tr. 186. Nor did the board review whether or not Adelphi's development activities had benefited from his presence in New York City. Tr. 845, 5516. Indeed, in testimony the trustees admitted that they had no idea whether or not Diamandopoulos had used the leased apartment for its intended purposes. Tr. 262, 7823-7824. Nevertheless, the board authorized Diamandopoulos to

select an appropriate property for purchase.⁽⁸⁾

In authorizing the purchase, the board of trustees placed no limit on the amount Diamandopoulos could spend. Tr. 5117-5118. Nor did the board appraise the value of the apartment or the relevant market before the purchase. Tr. 288. None of the trustees visited the apartment beforehand, and only three of them have been to the apartment since. Tr. 1398, 1565, 2524, 5952, 6699, 7538. Nevertheless, Adelphi purchased the apartment on East 72nd Street for \$1.15 million. Between the purchase date and March 1994, Diamandopoulos spent approximately \$170,000-190,000 of Adelphi's money on renovations and furniture. Tr. 342, 355-357, Ex. P-287. The trustees placed no limit in advance on these expenditures, Tr. 342, 882-883, 2352, and had no idea how much was spent. Id.

About 10 months later, in March 1994, the executive compensation committee chaired by Goulandris recommended that Diamandopoulos be rewarded with an option contract pursuant to which he was given the right to purchase the apartment, together with improvements and furnishings, at any time, up to and including within 15 days of his separation from the University, for \$905,000 -- a significant discount from the \$1.15 million purchase price plus approximately \$190,000 in furniture and improvements. Tr. 308-309. While the board did not discuss the option at its March 1994 meeting, at the hearing the trustees on the committee explained the purpose of the option in various ways. Procope viewed the option as a way to "lock" Diamandopoulos into a long-term commitment. Tr. 878. Yet, she could not explain how this was accomplished by an option Diamandopoulos could exercise at any time. Tr. 879. Goulandris stated that the option would compensate Diamandopoulos for the fact that he was required to live in University-owned housing during his presidency, foregoing the right to live in his own home. Tr. 2369. Goulandris acknowledged, however, that nothing in Diamandopoulos' employment agreement prevented him from buying a home to be used upon his retirement. Tr. 2369. Diamandopoulos testified that the option was given to ensure he would not be "homeless" upon his retirement. Tr. 313. Yet, he also acknowledged that he was not constrained by his contract from purchasing a home during his presidency. Tr. 143.

It is clear from this record that the trustees failed to exercise the care ordinarily prudent trustees would exercise in making an informed decision about the purchase of the apartment and the extension to Diamandopoulos of an option to buy. The trustees did not know whether it made sense to make the initial purchase, or whether the price was appropriate. The executive compensation committee did not have the apartment appraised before executing the option, Tr. 2347, nor did Goulandris as chair ever inquire about whether an appraisal had been previously made. Tr. 2348. The conflicting testimony of the trustees demonstrates that the option price was set arbitrarily. Procope testified that the price was established unilaterally by Diamandopoulos and his real estate advisors. Tr. 877. Krasnoff, who also served on the compensation committee, said that the price was arrived at by "shooting arrows in the air." Tr. 6702. Goulandris said the price was arrived at by "ballparking the drop in the market that was known to have occurred" and using their "best judgment," Tr. 2346-2347, but admitted that no one on the committee was in the real estate business, Tr. 2347, or had any information before them evincing a drop in the market. The board did not know when they set the price that Diamandopoulos had spent about \$190,000 of Adelphi's money on furnishings and improvements. Tr. 2350. Nor did the trustees consider how Adelphi would assure a continued Manhattan presence, which the trustees testified was critical to Adelphi's mission, if Diamandopoulos exercised the option. Tr. 877-878, 882, 2591. Under direct questioning, Procope could not explain why the board would so quickly decide to relinquish its right to a valuable asset it had only recently found indispensable to its expansion, except to say that she did not believe Diamandopoulos intended to exercise the option. Tr. 1351. Diamandopoulos did, in fact, secure the option with the required \$5,000 deposit. Tr. 305.

Finally, while the full board ostensibly "approved" the option contract -- without understanding its content -- the record indicates that Goulandris may have even failed to advise the board of the existence of the option. The minutes of the March 2, 1994 meeting say only that Goulandris reported that he had discussed with Diamandopoulos a new "employment/separation" contract, Ex. P-16; they are silent regarding an option contract. Goulandris himself does not recall if he discussed the option with the full board. Tr. 2358. Krasnoff testified that Goulandris did not tell the board about the discount purchase provision. Tr. 6684, 6998. In fact, he stated that until an article about Diamandopoulos appeared in the New York Times in 1995, only the members of the compensation committee knew about the discount. Tr. 6698. Indeed, the board appears to have been ignorant of the details of the option contract until almost two years later, when it received the June 19, 1996 executive compensation report authored by Goulandris, which erroneously stated that Diamandopoulos can only exercise the option after his retirement. Tr. 337-341.⁽⁹⁾

e. Diamandopoulos' "Sabbatical"

The inclusion in Diamandopoulos' compensation of the so-called "sabbatical" provision reflects another instance in which the board has failed to exercise due care. In 1994, at Silber's suggestion, Tr. 2344, Diamandopoulos was given sabbatical leave at the rate of 1/6 of a year's salary for every year of service retroactive to July 1, 1985. Ex. P-18. In the event of Diamandopoulos' death, his heirs receive the amount of the earned sabbatical. Ex. P-18. The

executive compensation committee awarded this benefit to Diamandopoulos at a time when the Adelphi faculty accrued sabbatical leave at a rate of only one-half a year's salary for six years of service. Tr. 589. Moreover, the board was acting to tighten controls on faculty sabbaticals at exactly the same time it gave Diamandopoulos this generous benefit. Ironically, at the March 2, 1994 full board meeting -- where Diamandopoulos' sabbatical was also approved -- the board questioned the productivity of faculty on sabbatical. Observing that there were often no benefits to learning evident from faculty sabbatical reports, they directed the provost to track the outcomes of faculty projects through 1997 and then use the data to reevaluate the sabbatical policy. Ex. P-16. One year later, sabbaticals were frozen "until such time as proposals are strengthened to provide adequate detail regarding their merit." Ex. P-209. Goulandris indicated this was done to ensure that sabbaticals were not used as vacations, but had an intellectual function. Tr. 2768-2769.

Clearly, the board applied a very different standard to Diamandopoulos. Several trustees testified that Diamandopoulos' sabbatical was not for scholarship purposes, but to give Diamandopoulos some much needed time off. Tr. 6040-6041. Byrne conceded that this was a "unique arrangement" which he viewed more as compensation in lieu of a sabbatical than a sabbatical. Tr. 5559-5560. Trustee Nicholas Samios also admitted that the sabbatical arrangement was unusual. Tr. 7839-7840. Diamandopoulos conceded that, in the academy, sabbatical policies do not allow for an heir to inherit unused sabbatical time (as per Diamandopoulos' arrangement). Tr. 591. He further stated that a sabbatical must be justified in terms of scholarly projects that will be accomplished, and that his own arrangement had no such requirement. Tr. 591. Goulandris said the sabbatical was more like a bonus or a form of severance pay, rather than sabbatical. Tr. 2771. When Procope was asked why Diamandopoulos was given such a sabbatical agreement, she responded that "those of us on the compensation committee are not necessarily educators, so we do turn to educators (Silber)." Tr. 1371. Apparent from this record is that Diamandopoulos' sabbatical arrangement flies in the face of not only Adelphi's own policy, but perverts the customary and common sabbatical practice in the academy.

f. Diamandopoulos' Expense Account.

The trustees also failed to exercise due care in the reimbursement of Diamandopoulos' expenses. In our view, the board turned a blind eye to this subject, failing to adopt policies or procedures to protect Adelphi's interests.

Diamandopoulos' original contract provided for reimbursement of reasonable expenses necessarily incurred as part of Diamandopoulos' duties. What was "reasonable," however, was left entirely to Diamandopoulos' judgment, and was subject to no board control. The board had no policy, nor did it issue any guidelines, defining "reasonableness." Moreover, Diamandopoulos was automatically reimbursed for any expense he made, as long as he submitted documentation to treasurer Hennessy that the expenses were, in fact, incurred. Tr. 395. There was thus a

complete lack of board oversight in assuring "reasonableness."

Diamandopoulos' original employment agreement also provided that Diamandopoulos would be reimbursed for domestic travel only. Ex. P-4. No mention was made of international travel, Tr. 142-143, nor of his wife's travel expenses. Id. In 1990, however, Diamandopoulos began traveling abroad at University expense, always in first class, and often with his wife. Tr. 388-390. Diamandopoulos traveled to Greece every year since 1990, ostensibly to recruit Greek students, build a liaison with Athens University, and raise funds from wealthy Greek business men. Tr. 388, 390, 408, 425, 503, 765; Exs. P-102, 104, 105, 106. He also traveled at University expense once to Paris, France, four times to Geneva, Switzerland and twice to Bern, Switzerland, Tr. 388-395, 402-403; Exs. P-102-106, to obtain grants and purchase art for Adelphi.

While there is nothing per se improper in the board reimbursing Diamandopoulos for reasonable travel expenses connected to his official duties, the board failed to ask any questions about Diamandopoulos' travel. For example, was it authorized by the employment agreement? While Byrne testified that he gave Diamandopoulos permission to travel internationally at Adelphi's expense, Tr. 5289-5290, 5485, the employment contract, while amended annually, was never changed to include reimbursement for international travel. Tr. 5486. Were the expenses "reasonable," in light of the articulated goals? The board apparently never defined or evaluated "reasonableness." Other than Byrne's claim that he and Diamandopoulos occasionally discussed Diamandopoulos' trips when Diamandopoulos returned, Tr. 5290-5291, there is no demonstrable evidence that the board as a whole ever discussed the trips, reviewed their costs or evaluated their results. Tr. 5490. Had they done so, they would have found that six trips to Greece resulted in no alliance with Athens University, the recruitment to Adelphi of only 30 Greek students, and no increase in Adelphi's endowment. Tr. 1033-1034. In Procope's words, "nothing" had come of Diamandopoulos' trips to Greece. Tr. 1385-1386. However, Diamandopoulos' travels to Greece at University expense did bring him personal benefit: they enabled him to travel inexpensively each time to his home in nearby Crete, by charging the New York to Athens portion of the trip to the University, and paying the additional minimum excess travel expense himself. Tr. 388. Similarly, Diamandopoulos' four trips to Geneva resulted in no contributions from the Onassis Foundation. Tr. 402, 5489. Diamandopoulos' two trips to Bern, Switzerland to obtain art donations for the University, Tr. 403, resulted only in Diamandopoulos' purchase of art for his private collection. Id.

On this record, we recommend the removal from the board of trustees Diamandopoulos, Procope, Goulandris, Carlino, Burke, Byrne, Calabrese, Contominas, Damadian, Friedman, Kramer, Krasnoff, Kulukundis, Lois, Riggio, Samios, Silber and Silveri on the grounds that they have failed to make informed and conscientious decisions concerning Diamandopoulos' compensation, and have thus neglected their duty of care. We do not recommend the removal of trustee Kagan, whose recent tenure (December 1995) and limited participation on the board (first meeting: June 1996) insulate him from this result.

2. Compensation Not Commensurate With Performance.

We further find that, for the academic years 1993 through 1996, the board of trustees failed to exercise due care to ensure that Diamandopoulos' compensation package as a whole was "reasonable" and "commensurate with the services performed," as required by N-PCL §202(a)(12). In reaching this conclusion, we are mindful that judging whether compensation is "commensurate with services performed" is, to some extent, subjective, and thus might not, under circumstances less egregious than those present here, alone provide a sufficient basis for removal. However, in this case, the board of trustees failed to exercise any control over Diamandopoulos' compensation, wholly abdicating their responsibility to review and determine appropriate terms. Moreover, the few trustees who did set Diamandopoulos' compensation did not have any rationale for their decisions, failing to use objective measures that prudent board members should have used to gauge the reasonableness of their executive's compensation (e.g., comparable packages, performance measures, evaluations of executive effectiveness, assessment of the University's progress in areas of enrollment, recruiting, endowment, fundraising, etc.). Based on the totality of this record we are persuaded that, when measured against these objective factors, Diamandopoulos' performance did not warrant the compensation he received from 1993-1996.

While the board's complete failure to articulate performance measures or evaluate results makes more difficult our task of analyzing the value of Diamandopoulos' services, we will rely in our analysis on those factors mentioned by Byrne and Diamandopoulos in their testimony. Byrne testified that when the trustees hired Diamandopoulos, they were looking for leadership in five principal areas: development and implementation of a long-term academic strategy; development and implementation of a long-term recruitment and enrollment strategy; development and implementation of a fundraising plan; improvement of the fiscal status of the institution; and creation of a physical plan. Tr. 5099-5101. Diamandopoulos said that he was to be evaluated based upon his progress on the academic plan, the recruitment plan, the development plan and the physical plan. Tr. 620.

With respect to the academic strategy, Byrne explained that the trustees wanted Diamandopoulos to return to a more traditional focus on liberal arts. Tr. 5079. In December 1987, two and one-half years into Diamandopoulos' tenure as president, the Middle States Association evaluated Adelphi. Ex. R-23D. While Middle States recognized that Adelphi had made considerable fiscal progress since Diamandopoulos had become president, it also found several areas of concern. First, Adelphi still did not have in place a mission statement or institutional goals. Id. While Adelphi had already decided to strengthen its liberal arts base, Middle States warned that it was placing too much emphasis on programs that were not yet in place. To preserve enrollment during a period of transition, Middle States noted that Adelphi should plan programs for students who were already in place or were likely to be attracted to Adelphi. Id. Middle States also encouraged Adelphi to spend more for academic programs, rather than achieving savings by decreasing instructional expenses and scholarships. Id.

Despite these words of caution, the first academic plan was not in place until 1990 -- five years into Diamandopoulos' tenure. Ex. R-YYY (the "plan"). (At this point, Diamandopoulos' base salary had grown from \$95,000 to \$215,000.) In it, the College of Arts and Sciences was to be the hub of the University. Tr. 5318, 5327, 7790. The central strategy of the College of Arts and Sciences was to be a CORE curriculum. The CORE, however, was not in place until 1990, Ex. P-48, and was not fully implemented until 1992. Tr. 5590; Ex. P-214. (Diamandopoulos' base salary had by then grown to \$250,000.) The plan also called for a university-wide enrollment by 1996 of 4,000 full-time equivalent students (FTES) at the undergraduate level (as compared to 3746 in 1989-1990) and 2,000 FTES at the graduate level (compared to 2,115 in 1989-1990). Ex. R-YYY.

Despite this plan, enrollment started to fall. One year after the plan (1991), Diamandopoulos reported to the trustees that undergraduate enrollment had failed to grow, and that progress was too slow to meet the plan goals by 1996. His primary strategy to increase enrollment was creation of an Honors College to attract higher quality students to Adelphi. Tr. 642. Id. However, the Honors College was not implemented until 1994 -- three years later. Tr. 7069. Procope acknowledged that it took "long" for Diamandopoulos to implement the Honors College, and that the concept was hardly innovative, having started in the United States in the 1960's, and since been adopted by 300-400 other institutions. Tr. 1338-1339. In the meantime, Adelphi's undergraduate FTE enrollment continued to plummet. Between 1985 and 1995, it declined by 43.9%, from 4,658 to 2,612 FTE's. Ex. P-282. Over the same period of time, other colleges on Long Island, several of which Goulandris and Procope judged as comparable to and in competition with Adelphi, Tr. 741-742, 2124, fared much better, thus undermining Adelphi's argument that undergraduate enrollment was solely a function of Long Island's shifting demographics:

Hofstra University: -3.2%

LIU-CW Post: -19.0%

Dowling College: -6.9%

SUNY Stony Brook: -0.1%

Tr. 1468; Ex. P-65. ⁽¹⁰⁾ As of October 3, 1996, Adelphi's undergraduate FTE enrollment had slipped again, to 2,181. Ex. R-31E. Between 1985-1995, freshman enrollment also decreased from 850 to 385. Ex. P-282. The yield on new freshman applicants declined from 46% in 1990-1991 to 24% in 1996-1997. Ex. P-403. From 1985 through 1995, Adelphi's total full time equivalent enrollment fell by 34.1%, as compared with a 19% decrease for LIU-CW Post, a 0.3% increase at Hofstra, a 6.9% increase at SUNY Stony Brook, and a 25.2% increase at Dowling. Ex. P-281. During this period, however, Diamandopoulos' base salary continued to soar, from \$215,000 in 1990-1991 to \$330,750 in 1995-1996 -- together with increased insurance,

TIAA/CREF contributions, options to purchase real estate, and other perquisites. Tr. 179, 236.

While we do not take issue with the board's decision to create an Honors College, we note that it did not prove a panacea for Adelphi's ailments. The Honors College had an entering class in 1994 of 55; 65 in 1995 (17 of whom left by the end of the year), and 75 students in 1996. Tr. 3442. This represents 2 to 5% of the student body. Tr. 1664. Only 76% of students who have entered the Honors College since 1994 remain. Tr. 7091, 7121-7123. All of them are on some form of scholarship, with the average annual scholarship \$12,000, placing an additional financial burden on Adelphi, Tr. 7095-7096, and drawing funds away from other programs and students. Tr. 2647. The impact of the Honors College on the academic reputation of Adelphi did not significantly improve the SAT scores of other students, which have remained fairly constant, Tr. 4438, 5353, Ex. P-403, or increase the overall quality of applicants to the college. Tr. 6740. Nor has the Honors College stemmed the slide in undergraduate enrollments.

During this time, Diamandopoulos often expressed concern about the enrollment decline, but seemed helpless against it. A frequent turnover in the position of dean of admissions led Diamandopoulos to declare himself "de facto" dean of admissions. Ex. P-20. On December 15, 1994, Diamandopoulos addressed the faculty and said that the enrollment for academic year 1994-1995 had been disappointing with respect to number and quality of the incoming class. Exs. R-22W, R-25X. He also admitted a "downward slide" in admissions standards for several years. Id. Finally, he stated that 5,535 FTE's for 1995 "represents a number below which we cannot fall without as yet unimagined" consequences to the University. Id. On February 27, 1995, he used the same figure, stating that if that number was not reached, "all bets are off." Ex. R-25Y. In 1995, the numbers fell to 4,603. Ex. P-282a. Procope described the possibility that FTE enrollment will drop below 4,000 in the current year as "scary." Tr. 1383. It fell to 4,301. Ex. P-31E. Yet Diamandopoulos has had no plan to address the problem.

The financial dilemma created by the drop in enrollment was exacerbated by the University's tiny endowment, which necessarily made Adelphi's fiscal health heavily dependent upon enrollment (*i.e.*, income from tuition and fees). The board early on apparently recognized the need to decrease this dependence. According to Byrne, when the board hired Diamandopoulos, it was looking for someone with fundraising ability. While the apartment in Manhattan was purchased to augment Diamandopoulos' ability to raise funds by providing him with a base for developmental activities, Tr. 2315-2319, Diamandopoulos' calendar shows that the apartment was rarely used for such purposes, and trustee Samios testified that few fundraising activities have taken place there. Tr. 7822; Ex. R-28A.

Over ten years, Diamandopoulos made no significant progress in decreasing Adelphi's dependence on tuition. At the start of Diamandopoulos' tenure in 1985, Adelphi's finances were "stable but not secure," due in significant part to its high tuition dependency and low endowment. Ex. R-28P. Over the next ten years, Adelphi raised only \$2,820,075 in gifts and grants for the endowment, Ex. P-164, and \$8,697,371 in gifts and grants for unrestricted

reserves, Ex. P-94. In June 1994, treasurer Hennessy reported to the board that:

Despite the improvement in our financial condition, the underlying financial framework of the University remains unchanged. The consequence of a minuscule endowment leaves the University dangerously dependent on student revenue. Approximately 92% of total revenues are dependent on student enrollment.

Ex. R-14S. Hennessy indicated this was high when compared to other local colleges. Tr. 1457. Hennessy testified that the 1994 figure of 92% tuition dependency accurately portrays Adelphi's current situation, Tr. 1456-1457, and that throughout Diamandopoulos' tenure, the University's revenues have been approximately 90% dependent on tuition. Tr. 1460.

While Diamandopoulos and the trustees often lamented this situation, they never implemented any strategy to address it. At a September 18, 1986 meeting of the finance and investment committee, the committee acknowledged that 90% of Adelphi's income was generated from tuition, and that any more than 72% dependence on student generated income puts the institution in jeopardy. Ex. R-18Q. In November 1986, the board adopted a 10 year, \$150 million fundraising campaign to be implemented "immediately." Ex. P-262. However, there is no evidence that Diamandopoulos ever implemented the plan. Year after year, annual fundraising targets were missed. At the September 1987 meeting, the board noted the need for "more funds from grants, donations and increased enrollments" and that the fundraising target was not met. Ex. P-264. In May 1988, the president reported that "the University is still in a fragile state faced with the challenge of improving our enrollment and of improving our fundraising ability," and the development committee lowered its annual giving target because it was "unrealistic." Ex. P-266. In July 1989, the board asked Diamandopoulos to create a strategy and plan for the development of a fundraising campaign. Tr. 5223-5224. There is no evidence that Diamandopoulos ever developed such a strategy. In June 1990, the board directed Diamandopoulos to "move immediately and personally" into the area of development and funding. Ex. P-24. In September 1992, Procope indicated that the development division of the University "has been without a leader for some time" and that recruitment was proceeding. She noted the need for a person who could pursue creative fundraising. Ex. P-84. Chairman Byrne added that his "concerns remain with fundraising and enrollment." Ex. P-84. At the June 1994 meeting in Athens, 9 years into his presidency, Diamandopoulos proposed embarking on a multimillion dollar campaign to increase endowment, stating that no university can flourish without 20-40% of its income coming from endowment, and noting that Adelphi's endowment income was substantially below those figures. Ex. P-142. Hennessy reported that the tiny endowment created a dangerous situation. *Id.* Trustee Krasnoff asked Diamandopoulos to consult with Goulandris, the chair of the development committee, and present the board with specific strategies at the September 28, 1994 meeting. Ex. P-212. No such strategies were presented. Ex. P-211. Rather, at the subsequent meeting in December, Goulandris reported that "last year was not a very good year", but "for the first time we are approaching a systematic campaign for fundraising at Adelphi" (emphasis added). Diamandopoulos reported that there would be a "comprehensive decision" on fundraising at the March meeting." Ex. P-210. In March 1995, the

board's "comprehensive" decision was to hire fundraising consultants. Ex. P-209. And three months later the board decided to offset a projected \$6 million loss resulting from the enrollment drop by approving a tuition hike of 4.11% for residential undergraduates and 5.95% for graduate students. Ex. P-215. This raised Adelphi's tuition to the highest among Long Island competitors C.W. Post, Hofstra, New York Institute of Technology (NYIT), Dowling and Molloy. While Krasnoff testified that Diamandopoulos should be held accountable for his failure to address the enrollment/endowment problem, the continued escalation of his compensation under these circumstances indicates that he was not. Tr. 6729.

When asked at the hearing to explain why they continued to generously reward Diamandopoulos against this record, several trustees mentioned the great academic progress Adelphi has made under Diamandopoulos. When pressed for facts upon which their views were based, however, these trustees could point to few specifics. Procope admitted that she accepted at face value Diamandopoulos' statements about Adelphi's superlative progress and standing in the academic community. Tr. 1340. Indeed, she was unable to cite any publication in the popular press that extolled Diamandopoulos' accomplishments or Adelphi's academic reputation. Tr. 1332. Nor was she familiar with any article, book or study that rated Adelphi highly under Diamandopoulos. Tr. 745. Goulandris called Diamandopoulos one of the "most brilliant educators in the country," Tr. 2340, but he could not say upon what he based this assessment, other than on "keeping his eyes open and reading." His reading admittedly did not include Barron's Profile of American Colleges, Peterson's Guide, or U.S. News and World Report, reputable publications that rate colleges and upon which students rely in making their college choices. Tr. 2341, Exs. P-60, 61. Had Goulandris read them, he would have discovered what Silber, Kagan and Provost Igor Webb admitted at the hearing: that Adelphi has not attained a reputation of academic excellence under Diamandopoulos. Tr. 1670, 4653-4654, 6013. In fact, during Diamandopoulos' presidency, Adelphi's Barron's ratings have sunk from "very competitive" in 1986 to "competitive" in 1991 to "less competitive" in 1994. Ex. P-60. Diamandopoulos himself could not point to any national publication, article or survey that supports his claims of excellence. Tr. 620.

We would be remiss if we did not acknowledge the positive results Diamandopoulos has achieved over the past ten years. At the beginning of his tenure, Diamandopoulos oversaw the considerable increase in Adelphi's cash reserves by implementing tighter fiscal controls, improving collection procedures, updating the accounts receivable and eliminating ineffective accounting practices. Tr. 1080-1100, Exs. R-4E, 4F, 4H. Under Diamandopoulos, much of Adelphi's long-term debt has been retired. Tr. 1115-1116, Ex. R-4J. He has also caused substantial improvements to be made to Adelphi's physical plant, which had suffered from years of deferred maintenance. Tr. 1097-1100, 1109-1110, Ex. R-4I.

However, these achievements alone do not justify the magnitude of benefits conferred by the trustees upon Diamandopoulos since 1993. After eight years in office, by 1993 Diamandopoulos had still not implemented an effective academic strategy, had not presented or implemented a plan to make the University less dependent upon tuition and fees, had failed to raise academic standards, had watched helplessly as Adelphi lost its competitive edge in enrollment and tuition

and had presided over a complete breakdown in relations between faculty and administration. (See, pp. 46-48, *infra*). Yet, Diamandopoulos' 1995-1996 base salary of \$330,750 far exceeded those of college presidents at universities Procope judged as comparable: Long Island University (\$242,500); Dowling College (\$242,577); Hofstra University (\$186,716); NYIT (\$221,760). Tr. 1439-1440, Ex. P-82. As noted above, these presidents were achieving better results than Diamandopoulos in enrollment and tuition. According to a survey of The Chronicle of Higher Education based upon college tax filings, Diamandopoulos' 1994-1995 salary also far exceeded those of each of these presidents, making him the seventh highest paid president in the United States. Ex. R-30N. He was the highest paid among presidents of doctoral institutions. Tr. 7281, 7335. In 1993-1994, Diamandopoulos was second in salary only to John Silber. Ex. R-30N(a).

On this record, we find that the compensation packages conveyed upon Diamandopoulos from 1993 to 1996 were not, by any reasonable standard, "commensurate with the value of services performed." In our view, a prudent board of trustees should have taken a hard look at Diamandopoulos' entire record and carefully measured it against the compensation awarded. As set forth above, the board of trustees never did so, and the result was a compensation arrangement both without a rational basis and far in excess of the value of services performed. ⁽¹¹⁾

For these reasons, we recommend the removal from the board of trustees Diamandopoulos, Procope, Goulandris, Carlino, Burke, Byrne, Calabrese, Contominas, Damadian, Friedman, Kramer, Krasnoff, Kulukundis, Lois, Riggio, Samios, Silber and Silveri. We do not recommend the removal of trustee Kagan, whose recent tenure (December 1995) and limited participation on the board (first meeting: June 1996) insulate him from this result.

Finally, we find that the trustees cannot rely on the "business judgment rule" to protect them from removal on this record. As discussed above, the rule does not shield from scrutiny irrational decisions that are based on inadequate information or consideration. See Marx v. Akers, 88 N.Y.2d 189 (1996). It is simply no defense where, as here, trustees have wholly failed to exercise any judgment whatsoever. See Hanson Trust PLC, HSCM Industries Inc. v. ML SCM Acquisition Inc., 781 F.2d 264 (2d Cir. 1986). Nor can the trustees invoke the rule's protections when they have failed to exercise the degree of care and diligence which ordinary persons in their positions would exercise. *Id.* When directors act blindly, recklessly and heedlessly, as these trustees have in setting Diamandopoulos' compensation, they cannot escape responsibility for their conduct.

III. The Conflicts of Interest.

In addition to the fiduciary duty of care, trustees of not-for-profit institutions also owe a fiduciary duty of loyalty to the corporation. The duty of loyalty:

[R]equires a director to have an undivided allegiance to the organization's mission --when using either the power of his position or information he possesses concerning the organization or its property. And it bars a director from using his position or information concerning the organization and its property in a manner that allows him to secure a pecuniary benefit for himself. ...[T]he director's conduct, at all times, must further the organization's goals and not his own interests.

D. Kurtz, supra, at 59-60. As fiduciaries with a duty of loyalty to the corporation, board members "may not profit improperly at the expense of the corporation." S. H. and Helen R. Scheuer Family Foundation, Inc. v. 61 Associates, et al., supra, at 70. As stated by Judge Cardozo:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Meinhard v. Salmon, et al., 249 N.Y. 458, 464 (1928). Thus, trustees must scrupulously avoid potential conflicts of interest and disclose to their board the material terms of any transaction in which they may have a pecuniary or financial interest.

A. Adelphi's Insurance Coverage.

In 1985, Alexander and Alexander was Adelphi's insurance brokerage firm, Tr. 909, Chubb, Inc., its primary carrier ("Chubb"), and LRF, its risk management consultant firm. Tr. 910. In 1986, instability in the insurance industry jeopardized Adelphi's coverage. Tr. 910-916. In the spring of that year, LRF warned that Adelphi's premiums were likely to increase by as much as \$400,000. Tr. 912-913; Ex. R-10Q. Chairman Byrne thus appointed an ad hoc committee to evaluate Adelphi's insurance predicament and report back to the board. Tr. 919-920, 1215, 1222, Ex. R-18R. The committee, comprised of trustees Jay Raddock, Gerald Guterman and Ernesta Procope, was chaired by Procope because of her expertise in insurance and was formed as a subcommittee of the finance committee. Id. According to Procope, the committee's charge was to review the current program and determine its adequacy. Tr. 1222. The ad hoc committee in turn assigned this task to E.G. Bowman, Inc. ("Bowman"), an insurance brokerage firm wholly owned and run by Procope. Tr. 1224. Bowman is in the business of designing insurance coverage programs for its clients and obtaining coverage from carriers. Tr. 728. According to Procope and Mark Charron, an insurance expert offered by the trustees, Bowman receives commissions based on the premium of the

policy written.⁽¹²⁾ Tr. 1263, 5694.

There is no dispute that, as of October 1986, Chubb was threatening to cancel Adelphi's coverage. Tr. 924. Adelphi gave Treiber-Salerno, a brokerage firm, a broker of record letter authorizing it to explore alternative coverage on behalf of Adelphi. Tr. 93. At a subsequent meeting among representatives of Adelphi, Bowman, Alexander and Alexander and Chubb, Chubb confirmed its reluctance to renew. Tr. 931-934. The results of that meeting were reported to the ad hoc insurance committee. Tr. 931-933, Ex. R-10W(a). Consequently, Procope suggested to Diamandopoulos that Adelphi move its insurance from the Long Island office of Chubb, to the Manhattan office of Chubb, where Bowman had relationships upon which it would capitalize to retain the Chubb coverage. Tr. 936-937, 1233-1234; Ex. R-10W-a. Diamandopoulos issued a broker of record letter to Bowman in December 1986 for this purpose. Tr. 936-937, 5369; Ex. P-137.

Adelphi subsequently received an insurance proposal from Treiber-Salerno on or about January 14, 1987. Tr. 938; Ex. R-8V. The proposal was analyzed for Adelphi by Bowman, which, because it also held a broker of record letter, could fairly be characterized as Treiber-Salerno's competition for Adelphi's business. In a January 29, 1987 letter to Adelphi's vice president of administration, George Osborne (copied to Diamandopoulos), Bowman advised against the Treiber-Salerno proposal because it did not contain sufficient information to allow Bowman to properly compare the coverages offered with those currently in effect. Bowman indicated that it "needed specimen policies, a C.I.G.N.A. quotation letter, and a description of the proposed safety group" to thoroughly analyze the proposal. Ex. R-8W. Bowman also expressed a concern about penalties Adelphi might incur if it changed carriers midterm. Tr. 945. Id. LRF shared this concern. Bowman closed by seeming to solicit Adelphi's business for a fee:

As you are aware, we are presently performing these necessary services without compensation. This is primarily the result of our respect and consideration of your president, Dr. Diamandopoulos. We look forward to the evolution of a mutually rewarding long-term business relationship.

(emphasis supplied), Exs. P-42, R-8W. Procope admitted under oath that this "looks like a pitch" for Adelphi's business. Tr. 1237.

Diamandopoulos discussed the letter with Osborne and Adelphi treasurer Hennessy, and directed Bowman to move the Chubb policy to the Manhattan office. Tr. 948-949. Diamandopoulos then rejected the Treiber-Salerno proposal, without requesting the missing information Bowman said it would need to analyze the proposal. Tr. 1248, 5757-5758. LRF was dismissed as a risk manager on February 17, 1987, Tr. 964, Ex. P-147, and Alexander and Alexander's termination followed. Tr. 964.

Up until this point, the board believed that Bowman was acting purely as an advisor to the ad hoc committee. Tr. 82-83, 101-102. Then, at the February 27, 1987 meeting of the finance and

investment committee, Diamandopoulos reported for the first time that Bowman would actually be handling the University's insurance work for fiscal year 1986-1987. Ex. R-18U. He said that the work was being undertaken "free of charge". Tr. 959.

In fact, 1986-1987 is the only year in which Bowman earned no fee for its work for Adelphi. Bowman ultimately earned a commission for the 1987-1988 successful renewal with Chubb. Tr. 953, 1253. Bowman then continued to handle all of the University's insurance work, Tr. 965, and currently handles all aspects of the Adelphi account -- for a fee. Tr. 961. As Bowman had hoped for in its January 1987 letter, its consulting role blossomed into a "long term business relationship", the material terms of which neither Procope nor Diamandopoulos ever disclosed to the board. Tr. 100, 1422. Those terms include the issuance of broker of record letters and Bowman's receipt of fees since 1987 in the approximate amount of \$1,227,949. Ex. P-274. These fees represent a 10-15% commission taken against policy premiums. Tr. 1418-1419, 2893-2894. The only "free" service Bowman provides to Adelphi is the risk management service formerly provided by LRF. Tr. 965.⁽¹³⁾

In our judgment, Procope and Diamandopoulos neglected their fiduciary duties to Adelphi in several respects. First, Procope failed to disclose the material terms of the relationship between Bowman and the University. The record shows that, while the board members knew of Procope's relationship to Bowman, they believed Bowman was providing its services to the University free of charge. Indeed, both Diamandopoulos and Hennessy had expressly told the board so, and neither Procope nor Diamandopoulos ever said anything to correct this misimpression. Even when Procope filed her first conflict of interest statement in March 1996, she revealed nothing about the fee arrangement: "My firm, E.G. Bowman, Co., Inc., serves as a broker (insurance) for Adelphi University". Ex. R-28B. The failure of Procope and Diamandopoulos to disclose these material terms to the board prevented the board from making an informed choice of brokers and assessing whether there was any potential conflict between Procope's role as trustee and her business interests.

Moreover, Procope appears to have used her position as a trustee to give Bowman an unfair advantage in obtaining the Adelphi account. The facts show that the free consulting services originally provided by Bowman turned into a business relationship for which other brokers were blocked from competing. The only other broker that Adelphi even considered -- Treiber-Salerno -- was eliminated by Diamandopoulos when it failed to provide sufficient information in its proposal. Ironically, that proposal was assessed as inadequate by Bowman, Treiber-Salerno's sole competitor. Moreover, neither Diamandopoulos nor Procope ever asked Treiber-Salerno for the information needed to thoroughly evaluate the proposal. Indeed, Procope -- in a graphic illustration of the confusion between her dual roles -- testified that she made no attempt to obtain the information, because it "was not Bowman's responsibility" to do so. Tr. 1248. We believe that it was Procope's responsibility, as the trustee with insurance expertise upon whom the board was relying for advice, to ask for that information on Adelphi's behalf, and to ensure that the competition for Adelphi's business was broad, open and fair. Instead, Procope's conduct ensured the elimination of all competition, securing to Bowman the Adelphi account. This is precisely the

"evolution" Bowman had hoped for when it first "pitched" Adelphi's business in January 1987.

Based upon the record, we also find that Diamandopoulos' actions were not consistent with his duties of undivided loyalty and care to Adelphi. Had Diamandopoulos been acting solely in Adelphi's interest or as a reasonably prudent trustee, he would have seriously considered other brokers, obtained additional information from Treiber-Salerno to permit a critical evaluation of its proposal, ensured an independent analysis of Treiber-Salerno's offer, and investigated whether anticipated short-term penalties could be mitigated. Under the circumstances, Diamandopoulos' actions can reasonably be interpreted as intended to curry favor with Procope -- who has played a key role in setting his compensation every year since 1986 -- by guaranteeing the Adelphi account to her company for at least as long as she remained a trustee.

The trustees went to considerable lengths at the hearing and in their post-hearing brief to prove that the arrangement between Bowman and Adelphi was "fair", *i.e.*, economically advantageous, to Adelphi. They seem to rely on N-PCL §715 for the proposition that if the deal were fair, then Procope has no conflict of interest for which she can be removed. We think this too expansive a reading of §715. Section 715 speaks only to the circumstances under which a corporation by legal action may void a contract where a conflict of interest is found to exist. It does not stand for the proposition that if the contract is ultimately found to be fair, the conflict never existed and the interested trustee is absolved of any wrongdoing. To the contrary, while fairness to the corporation may somewhat relax the conflict of interest constraints, the director's conduct must, at all times, further the organization's goals and not his or her own interests. D. Kurtz, *supra*, at 59-60. Based upon the record before us, we cannot find that Procope's actions at all times furthered Adelphi's goals and not her own interests. Indeed, the magnitude of the commissions earned by her wholly-owned company (\$1,227,949), the obvious and intentional solicitation of Adelphi's business, the failure to ensure a level playing field of competitors -- all demonstrate that Procope acted in self-interest. Because of her conflicted roles, we will never know whether or not Adelphi obtained the lowest cost coverage best suited to its needs, or whether another broker would have been a better choice.

Under these facts, we recommend the removal from the board of Diamandopoulos and Procope for neglect of their duties of due care and loyalty.

B. The Lois Advertising Campaign.

Trustee George Lois ("Lois") is a creator of advertisements and owner of LOIS/USA, an advertising agency. Tr. 2379-2380. Lois was recruited to the board in 1993 by Diamandopoulos because of Lois' advertising expertise. Tr. 2387-2388. Throughout his trusteeship, Lois has been the chair of the Institutional Advancement Committee, Tr. 2434-2435; Ex. P-355, the purpose of which is to advance the "imagery and perception" of Adelphi. Tr. 2434. Trustee Hilton Kramer

also served on that committee. Tr.2434.

When Lois joined the board, Adelphi had another advertising agency under contract. Tr. 2478. Shortly into his tenure, Lois decided that Adelphi needed a different approach to marketing. Tr. 2387-2389. Lois met with Diamandopoulos and proposed a new and creative advertising campaign centered around the idea of teachers as mentors. Tr. 2390-2392. At the December 1994 meeting of the board, Lois presented his proposal to the full board. Tr. 2392-2396. On a motion by Diamandopoulos, seconded by Procope, the board unanimously approved the campaign, Ex. P-210, with Lois apparently failing to recuse himself from the vote. Id. Before acting, neither the committee nor the full board established an advertising budget, discussed Lois' fees, reviewed the projected cost of the advertising, Tr. 2487, or solicited proposals from other advertising agencies. Tr. 703-704, 1283, 2492-2493. Once the Lois campaign was approved, Adelphi dismissed its then advertising agency. Tr. 703-704. On March 8, 1995, Lois reported to the full board on the progress of his work. At the conclusion of Lois' presentation, Diamandopoulos thanked Lois for "giving his services, free of charge, to the University." (emphasis supplied). Ex. P-209.

From December 1994 until June 1996, the board thus proceeded under the mistaken belief that Lois was not being paid for his work for Adelphi. Tr. 700, 2025, 2893-2894. In reality, while Lois had donated valuable creative services to the University, he had also received approximately \$155,000 in commissions from advertisements placed on Adelphi's behalf, and was paid costs for producing recruitment brochures for Adelphi. Tr. 2480-2482. Neither Lois nor Diamandopoulos disclosed these material facts to the board, Tr. 2417, 2419, until Lois was required to file his financial disclosure statement in June 1996. In it he acknowledged for the first time that, beginning in "April 1995 payments were made by Adelphi for production of advertisements and placement of ads. All charges for creative work...have been waived." (emphasis supplied) Ex. R-28B.

On this record, we find that Lois neglected both his duties of due care and undivided loyalty to Adelphi. The Institutional Advancement Committee, with Lois as chair, was charged with promoting Adelphi's public image. Implicit in this charge was the obligation to select the advertising agency and campaign best suited to Adelphi's needs. Instead, Lois' committee sought no proposals and considered no ideas other than those advanced by Lois, its chairman. Under these circumstances, Lois' dual roles as vendor and client prevented him from faithfully and objectively discharging his fiduciary obligation to advance only Adelphi's goals and not his own interests.

Lois also violated his fiduciary duty by failing to disclose to the board that LOIS/USA was, indeed, being paid for services rendered to Adelphi. A fiduciary has a duty to fully disclose to his board all the material terms of any transaction that might present a conflict of interest, including any terms of compensation. In this case, full and fair disclosure would have enabled the board to make an informed choice of advertisers and assess whether Adelphi's relationship with

LOIS/USA was beneficial to Adelphi. Instead, Lois let stand the board's false impression that his services were given free of charge, effectively eliminating any competition for the Adelphi advertising account.

We further find that Diamandopoulos neglected his fiduciary duty to Adelphi by misrepresenting the terms of LOIS/USA's relationship with Adelphi. The record shows that Diamandopoulos knew that Adelphi was compensating Lois for production work and the placement of ads, yet Diamandopoulos told the board that the services were being provided "free of charge." Tr. 701; Ex. P-209. Diamandopoulos had a fiduciary duty to tell the board the truth about Lois' fees and apprise the board of any potential conflict of interest. Instead, Diamandopoulos told no one.

On this record, we recommend the removal of trustees Diamandopoulos and Lois for neglect of their fiduciary duties of due care and loyalty.

C. The Board's Failure to Protect Adelphi From Interested Trustee Transactions.

We further find that the full board of trustees neglected its duty of due care to Adelphi by failing to take appropriate action once it learned of Procope's and Lois' potential conflicts.

In 1995, the board of trustees finally adopted the 1993 recommendation of its auditors, Deloitte and Touche, that all trustees file written statements disclosing any potential conflicts of interest. Tr. 2855, 2858. As noted above, Procope filed her statement in March 1996, confirming for the first time that "my firm, E.G. Bowman, Inc., serves as a broker (insurance) for Adelphi University," Ex. R-28B, and raising the possibility of a conflict between Procope's role as trustee and businesswoman. In our view, this revelation should have raised serious questions among prudent trustees about the propriety of the Bowman/Adelphi relationship. At a minimum, the board should have fully reviewed the circumstances that gave rise to the Bowman/Adelphi relationship, carefully examined the financial terms of the relationship and how they were established, solicited and fairly considered other insurance brokerage firms and proposals, and considered action against Diamandopoulos and Procope for neglecting their fiduciary duties to Adelphi, as described above. There is no evidence in the record before us that the board took any action to protect the University's interests.

As in the case of Adelphi's insurance, we find that, once the board learned in June 1996 that a company owned by Lois was being paid for services provided to Adelphi, it was the board's responsibility to review the terms of LOIS/USA's compensation, solicit and review other advertising proposals, and consider action against Diamandopoulos and Lois for breach of their fiduciary duties to the University. The failure of the full board to take any action based upon the information it learned from Lois' financial disclosure form constitutes a neglect of duty.

On these facts, we recommend the removal of trustees Diamandopoulos, Procope, Burke, Byrne, Calabrese, Carlino, Contominas, Damadian, Friedman, Goulandris, Kramer, Krasnoff, Kulukundis, Lois, Riggio, Samios, Silber and Silveri for neglect of their duty of due care. For the reasons set forth in Point II.D., supra, we do not recommend the removal of trustee Kagan.

D. The Byrne Conflict.

It is undisputed that Carolyn Byrne, wife of former chairman James Byrne, was employed by the University in several capacities over the years. Based upon the record before us, we do not question the value of Mrs. Byrne's services to Adelphi or her entitlement to the salary she earned. Nor have petitioners proffered any evidence that Byrne failed to disclose his relationship to Mrs. Byrne, or that he improperly used his position to influence administrative decisions regarding his wife. Rather, our concern is with a more discrete issue: the refusal of chairman Byrne to disclose administrative salaries, including that of his wife, upon the request of the chair of the finance committee.

Former trustee William Borten ("Borten") testified that in 1990, while serving as chair of the finance committee, he became concerned that administrative salaries had allegedly increased 57% over three years, while faculty salaries had increased only 6% and enrollment remained flat. Tr. 36. He thus made several requests of Diamandopoulos for information on administrative salaries. Diamandopoulos complied with his first request. Tr. 46; Ex. P-50. Borten then asked for more details prior to the next finance committee meeting. Tr. 50. Specifically, Borten wanted names and salaries of certain high level administrators. Tr. 5301. By this time, Mrs. Byrne had been promoted to vice president in charge of community relations and external affairs. Accordingly, her salary would logically have been within Borten's request.

This time, however, Borten received no response to his request. Tr. 51. Borten discussed the matter with chairman Byrne. Byrne told Borten that he did not believe he was entitled to such information. Tr. 87, 5302. Borten responded that he felt he was being stonewalled, and did not know if he could continue on the board under the circumstances. Tr. 5301. Byrne elected to interpret Borten's statement as a resignation, and subsequently accepted it even though Borten had not, in fact, tendered it. Tr. 5301. Byrne admitted at the hearing that, as chairman of the board, he had the information Borten requested, but did not give it to Borten because he believed Borten was not entitled to it. Tr. 5302. Byrne offered no basis for this belief. Id.

We find that Byrne acted improperly by refusing to give Borten the information he requested. Under Adelphi's Bylaws, the board's finance committee is charged with reviewing annual operating and capital budgets and making recommendations regarding them. Ex. P-2, §6B. Clearly, the information Borten requested was relevant to his responsibilities as finance committee chair. Borten testified that he intended to use the information to suggest fiscal changes, if he thought them appropriate. Tr. 89. Trustee Samios, the chair of the finance

committee beginning in 1992, Tr. 7764, agreed that the finance chair should have access to administrative and faculty salaries. Tr. 7838. Indeed, without that information, Borten could not effectively discharge his duty as committee chair. In Baker v. Henry Glass & Co., 140 Misc. 2d 836 (Sup. Ct. N.Y. County 1988), the court found that a committee of a board could not deny another board member access to information about employees' salaries where that board member might be held accountable for actions taken with regard to those salaries. That principle applies here.

Were this Byrne's sole neglect of fiduciary duty, it alone would not justify his removal from the board. However, we find that Byrne's actions must be viewed together with his actions regarding Diamandopoulos' compensation, the Procope and Lois conflicts, and the failure to enforce the Articles of Governance (See, Point VI, infra). Based upon the totality of the record before us, we therefore recommend Byrne's removal from the board for neglect of duty.

E. The Carlino Conflict.

Trustee Joseph Carlino ("Carlino") is of counsel to the firm of Forchelli, Schwartz, Mineo and Carlino, which Diamandopoulos retained to perform land use and zoning work for Adelphi from 1989 through 1994. Tr. 5895-5896, 5901-5903. It is unclear whether Diamandopoulos was aware when he hired the firm that trustee Carlino was "of counsel" to the firm. Moreover, there is no evidence in the record that Carlino played any role in obtaining the Adelphi business for the firm. Tr. 5905-5906. Rather, it appears that the firm was retained because of its considerable reputation on Long Island in land use and zoning law. Tr. 5911.

Moreover, the record demonstrates that Carlino did not realize any benefit from the firm's representation of Adelphi. Tr. 5897-5898. Jeffrey Forchelli, a partner in the firm, testified that Carlino did not participate in the fee income received from the University. Tr. 5903-5905. In fact, since 1991, Carlino has received no remuneration whatsoever from the firm, except medical insurance. Tr. 5904. Moreover, Carlino's involvement with both the firm and Adelphi have been minimal since 1993, due to illness. Id.; Tr. 2327.

On these facts, we find no breach of duty on the part of Carlino, Diamandopoulos or the board of trustees with respect to the retention of the Carlino firm as legal counsel.

IV. The Purchasing of Goods and Services.

Beginning in September 1987, Remzi Barolli ("Barolli"), Adelphi's director of business affairs, noticed several irregularities in the purchasing of Adelphi's goods and services. Tr. 2045-2051.

Specifically, he suspected that Jerry Jodice, assistant to the president ("Jodice"), Tr. 2049-2050, was billing the University for goods and services never received. Tr. 2052. Barolli's investigation revealed that Jodice had billed Adelphi for a stereo system that had not been received, Tr. 2061-2062, for work never done by a company owned by Jodice, Tr. 2087-2088, for an air conditioner that was allegedly sold to Adelphi by a friend of Jodice's but never received, Tr. 2091-2092, and for repair work on vans that were actually returned before the work was done. Tr. 2092-2099.

Barolli advised Diamandopoulos of his findings, urging Diamandopoulos to remove Jodice from his position because he believed he was stealing from the University. Tr. 2102-2103.

Diamandopoulos instructed Barolli not to tell anyone about the irregularities. Tr. 2269. Barolli assumed that this included members of the board's audit committee. Tr. 2276-2277.

Diamandopoulos told Barolli that he would, indeed, fire Jodice once a certain dormitory project was completed. Tr. 2104.

Despite changes in procedures, Barolli continued to have problems with Jodice, Tr. 2109-2111, and so advised Diamandopoulos, Tr. 2115. Barolli eventually learned that Jodice had a criminal history, and obtained a copy of Jodice's record, which allegedly included a conviction for embezzlement. He provided the document to Diamandopoulos. Tr. 2116-2125.

Jodice continued to violate purchasing department rules, Tr. 2133-2138, but was nevertheless promoted to executive director of facilities and planning, Tr. 2140, where he was responsible for the physical plant of the University, including the purchases of goods and services. Tr. 2141.

Barolli testified that in 1992, he talked to Maryanne Panebianco, the University's director of internal audits, about conducting an audit of Jodice's department, because he believed that Jodice was still stealing. Tr. 2148-2149. Around this time, Barolli discovered that Jodice had submitted a fictitious bid. Tr. 2156-2159. Barolli testified that when he brought this to the attention of Eric Ottervik, Adelphi's Vice President for Administration and Information Systems, Ottervik attempted to fire Jodice, but was overruled by Diamandopoulos. Tr. 2142-2143, 2156-2159.

Ms. Panebianco audited Jodice's office in the fall of 1992, Tr. 2154-2156, covering the period of September 1, 1991 - September 30, 1992. Tr. 2161-2162; Ex. R-14G. Jodice and Ottervik were the subjects of the audit, Tr. 2842, which indicated non-compliance with a significant number of the University's purchasing policies. Tr. 2165-2166. Of 37 technical purchases authorized by Jodice, 30 lacked the requisite number of bids. Tr. 2167.

The audit report was presented to the audit committee, Tr. 2841-2842, and discussed at the committee's meeting of December 1, 1992, at which Diamandopoulos was present. Tr. 2843-2844. Trustee Thomas Calabrese ("Calabrese"), chair of the audit committee since 1990, Tr. 2831, testified that Diamandopoulos was present and did not mention any issue existed with

respect to Jodice's prior performance or criminal record. Tr. 2833-2835, 2844-2845.

The audit committee recommended some changes in procedure, Tr. 2847, but did not recommend any disciplinary action against employees. Tr. 2848-2849. When Calabrese reported the findings and recommendations to the full board on December 2, 1992, Diamandopoulos was again present. Tr. 2850-2851, Ex. P-214. Neither Calabrese nor Carol Sabino, who took the minutes, recall that Diamandopoulos raised any issue concerning Jodice's performance, Tr. 2851, 4007, and the minutes do not indicate that the issue was discussed. Ex. P-214.

Based upon the record, we find that the board of trustees properly discharged its duties with respect to the allegations of wrongdoing in the purchasing of goods and services for the University. However, we also find that Diamandopoulos neglected his duty as trustee with respect to these same allegations by failing to disclose to the audit committee facts pertinent to their review of the University's purchasing department. At the time of the audit, Diamandopoulos knew that Jodice was circumventing purchasing procedures and had allegedly been stealing from the University for years. He also knew that Jodice was specifically a target of the audit. Yet he failed to disclose this information to the committee or its chair, instead following his directive to Barolli to "tell no one." As a result of Diamandopoulos' failure to tell the audit committee what he knew about Jodice, the committee was without pertinent information needed to discharge its duties. Indeed, this information may well have affected the recommendations made by the committee. At the hearing, Chairman Calabrese implicitly acknowledged the significance of the information, indicating that as a trustee and chairman of the audit committee, he believes he should receive any significant information regarding financial misconduct. Tr. 2885-2887.

Thus, while we are not called upon to analyze the President's handling of the Jodice matter in his capacity as President and before it was elevated to the board's consideration, we do find that Diamandopoulos' duty of care to Adelphi as a trustee required him to disclose what he knew about Jodice to the audit committee once the committee undertook an investigation. His deliberate failure to do so amounts to a neglect of duty and warrants his removal from the board.

V. The Failure to Comply with the Internal Revenue Code

For five years beginning in 1988, Adelphi failed to report Diamandopoulos' salary on Form 990 submitted to the Internal Revenue Service ("IRS"), as required by law. Tr. 524-525. The decision to withhold this information was Diamandopoulos'. Tr. 526. When he made it, he knew that he

was required by law to file the information, and that his failure to do so violated the Internal Revenue Code. Tr. 531. Diamandopoulos' decision was intentional: he refused to file because he believed that disclosure would compromise labor contract negotiations.⁽¹⁴⁾ Tr. 529. Diamandopoulos did not tell the board that he was ignoring the filing requirements. Tr. 526.

Adelphi was eventually fined \$4,000 for failure to file a complete form in 1988 and 1989. Tr. 1061. The IRS audited Adelphi in 1992, resulting in additional penalties of \$7,500, for a total penalty of \$11,500. Tr. 1061, 1075. At the time, Adelphi's auditors, Deloitte and Touche, warned Treasurer Hennessy and Diamandopoulos that continued failures to file could result in additional civil or criminal penalties assessed against Adelphi. Ex. R-18K. Treasurer Hennessy testified that she thereafter sent a report to the trustees entitled "finance and investment summary." Tr. 1066-1067. It is unclear from the record exactly what that summary said. However, at the September 23, 1992 meeting of the finance and investment committee, which Diamandopoulos attended, it was reported that the IRS had conducted a thorough review of Adelphi for the year ending August 31, 1989, rendering an excellent report which required no fines and no change in its tax exempt status. The minutes indicate that Hennessy apprised the committee of a "few minor comments by the IRS regard[ing] the more complete filing of the University's information return Form 990." Ex. P-85.

In August 1994, the IRS notified the University that its review of Adelphi's Form 990's for the years 1990, 1991 and 1992 revealed missing information. Ex. R-20Z. It also stated that Adelphi had previously been advised that its failure to file could adversely affect its tax exempt status, and that its failure to file complete forms subsequent to notification were considered a "willful and flagrant disregard" of the law. The letter concluded by again warning that Adelphi's tax exempt status was in jeopardy.

We find that Diamandopoulos improperly withheld his salary information from the IRS, and unnecessarily jeopardized Adelphi's tax-exempt status in doing so. However, we also recognize that the Regents under Education Law §226(4) may only remove trustees for neglect of a trustee duty. The duty to file accurate and complete 990 forms was the President's, not the trustees'. Diamandopoulos acted solely in his capacity as President of the University, and not as trustee, in failing to file. Thus, while we believe his actions were reckless, we are not authorized to remove him on this ground.

VI. Governance of the University.

The academy is a unique institution whose philosophical goals, modes of operation, and governance structure distinguish it from other not-for-profit organizations and business corporations. In fulfilling its academic mission, the modern university is guided by the principle of shared responsibility. As in most universities, at Adelphi this principle is embodied in Articles of Governance (the "Articles", Ex. P-294) which recognize the discrete yet interlocking roles that trustees, administration and faculty play in matters of academic affairs. The Adelphi Articles

were unanimously approved by the board of trustees at a special meeting on December 24, 1990. Diamandopoulos described the Articles as speaking to the role of faculty, the president and the board of trustees in collegially-led universities. Ex. P-268. Id. Upon their adoption, he noted the board's commitment to them, and expressed his personal feeling that "I am looking forward to a new era of the closest and most constructive collegial relationships with the faculty...." Id.

The Articles set forth basic rules of shared governance. They provide that "The members of the Faculty are uniquely qualified to participate in the governance of the University, particularly with respect to academic matters and related educational policies and procedures." Ex. P-294. They further provide that the provisions of the Articles shall "ensure and maintain the right of faculty participation in the academic and educational affairs of the University." Id. The Articles authorize the faculty to:

pass upon the qualifications of its members in matters of appointment, tenure and promotion (Article II, §[B][2]);

participate in the selection of academic administrative officers (Article II, §[B][3]);

have faculty meetings at which the president or his designee shall be the presiding officer (Article II, §[C]);

be represented by the faculty senate (Article III, §[A]);

subject to the ultimate authority of the board of trustees, set standards of admission and retention of students; select appropriate faculty for participation in the selection of academic administrative officers (Article III, §[A][1],[5]);

advise on the creation or abolition of academic administrative offices and major issues affecting current or projected budget matters (Article III, §[B][1],[2]).

As the governing body of the University, the board of trustees has the duty to abide by and implement the Articles. Tr. 7847-7849; Ex. P-2, §2.

The record before us demonstrates that the board of trustees is neither implementing nor overseeing the implementation of the Articles' central tenets. Indeed, in our view, there has been a complete breakdown of the principles of governance -- which the board of trustees seems to countenance. The testimony adduced at the hearing shows that the administration refuses to

communicate with the faculty. Diamandopoulos stopped attending faculty meetings in 1995. Tr. 3028-3029, 3282; Ex. R-26M. Over the last two years, he has attended no more than five meetings of the faculty senate. Tr. 3468. Further, the board of trustees stopped inviting faculty to board meetings. Tr. 4650. Chairwoman Procope could not recall the last time a faculty member was invited to a board meeting. Tr. 748. Vice President Webb testified that there has not been a faculty senate presentation to the board of trustees in three years. Tr. 4648. We find it significant that board meetings no longer take place on campus, but in New York City, Tr. 5415-5416, making faculty participation difficult. Tr. 7520-7521.

Moreover, the board and its administration have deprived the faculty of any meaningful opportunity for input on major academic initiatives. For example, the faculty was not able to participate fully in the discussion of the academic plan in 1990. The board apparently prepared two versions of this plan, one version for trustees' eyes only (Ex. R-21P), another for public scrutiny (Ex. R-YYY). The confidential plan stated that certain graduate schools (the Schools of Nursing and Social Work and the Derner Institute of Advanced Psychological Studies ["Derner"]) were not academically essential to the University or important to its mission. Since this was not in the public report shared with the deans or faculty of these schools, Tr. 3614-3615, 4308, 4956, 5873, they were precluded from comment. The faculty had no role at all in the modified academic plan. Tr. 4747, 4763, 4765. When new admissions criteria were proposed for September 1995, the faculty was not consulted. Tr. 4845. Indeed, Goulandris testified that it was not the practice of the trustees to include faculty in their discussions of University goals. Tr. 2747.

Nor has the faculty been given any voice in many of Diamandopoulos' major appointments. Faculty input was either ignored or not obtained prior to the appointment of Provosts Webb, Blitz, and the tenure of Dean Garner. Tr. 3452-3453, 4601-4602. Some appointments to deanships, like those of Peter Costello of the College of Arts and Sciences and Robert Mendelsohn of Derner, have been "interim" in name, but lasted two years in Costello's case, Tr. 6121, 6277, and three years in Mendelsohn's case. Tr. 5823. This misuse of "interim" appointments has allowed Diamandopoulos to skirt customary appointment procedures in which the faculty would normally participate. There have been frequent turnovers in the deanships in the College of Arts and Sciences, the School of Business, the School of Education, the School of Social Work, admissions and associate deanships for students and students for minority affairs, Ex. P-332, and each position is currently vacant, Tr. 4855-4869, resulting in a significant void in leadership. Diamandopoulos has not consulted with faculty concerning the search for or hiring of replacement deans. *Id.* During his testimony Kagan admitted he did not know that any of these positions was vacant, Tr. 6033, and Byrne admitted that, although Diamandopoulos had been directed to fill the positions, he was not aware that any progress had been made. Tr. 5566.

In addition to failing to oversee or effectuate the implementation of the Articles, several trustees seem to have affirmatively disavowed them. In his testimony, Silber likened the faculty to barbarians. Tr. 1826. He invited faculty to "leave" if they disagreed with the Honors College and the core curriculum. Tr. 1956. He blamed all of Adelphi's problems on a small handful of faculty

who are "power mad, determine[d] to run that university." Tr. 2005. His proposed solution is to "lance" the "rather large boil" (the faculty) that is in "a very sensitive spot" on Adelphi. Tr. 2016. At a December 5, 1995 board meeting, chairwoman Procope, referring to the faculty, exclaimed in vitriolic fashion that "the Judas' responsible for this crucifixion [of Diamandopoulos] will pay for their betrayal for Adelphi will rise quickly and become the great institution for which President Diamandopoulos has had visions of at the year 2000 and beyond..." Ex. P-206. Goulandris agreed with this sentiment, if not Procope's choice of words. Tr. 2682-2684. In our view, none of the trustees demonstrates a present desire to work with the faculty, and have resolved that all faculty communications with the board go through Diamandopoulos. Tr. 6640, 6778, 7531-7532; Ex. P-205.

Based upon this record, we find that the trustees have failed in their duty to abide by and implement the Articles. The result is the generation of conflict and obstruction of the consensus needed to make shared responsibility work. In so finding, we specifically do not decide whether or not such neglect of duty violates the collective bargaining agreement between Adelphi and the faculty union. Rather, we find that, even in the absence of such an agreement or a unionized faculty, the Articles are enforceable and stand by themselves, and that the Board of Regents has independent authority under State law to determine whether or not the trustees have failed in their duty to abide by and implement the Articles. See Ex. P-294 (December 14, 1990 letter from Igor Webb). On these facts, we recommend the removal of trustees Diamandopoulos, Procope, Goulandris, Burke, Byrne, Calabrese, Carlino, Contominas, Damadian, Friedman, Kramer, Krasnoff, Kulukundis, Lois, Riggio, Samios, Silber and Silveri for neglect of duty. For the reasons set forth in Point II.D., supra, we do not recommend the removal of trustee Kagan.

VII. Conclusion.

Based upon the foregoing, we recommend the immediate removal from office of trustees Peter Diamandopoulos, Ernesta Procope, Peter Goulandris, Karen Elizabeth Burke, James T. Byrne, Thomas Calabrese, Jr., Joseph Carlino, Dimitri Contominas, Raymond V. Damadian, Robert B. Friedman, Hilton Kramer, Abraham Krasnoff, Elias Kulukundis, George Lois, Leonard Riggio, Nicholas P. Samios, John Silber and Angelo Silveri. We do not recommend the removal of trustee Donald Kagan, whose short tenure (December 1995) and limited participation on the board (first meeting: June 1996) insulate him from this result.⁽¹⁵⁾

We do not reach this conclusion lightly. We are mindful of the heavy responsibility placed upon the Board of Regents by the Legislature under Education Law §226(4). We take seriously the obligation of the Regents to safeguard the interests of Adelphi University and preserve its continued viability as an institution of higher learning. Adelphi has an important purpose to serve and we believe that, with strong, effective, and dedicated leadership, Adelphi can move forward into the twenty-first century and beyond. The University's seal includes these words: "the truth

shall make us free." It is in the spirit of that truth that we respectfully make this recommendation to the full Board of Regents.

Respectfully submitted,

J. Edward Meyer, Regent, Chair

Louise P. Matteoni, Vice Chancellor

Saul B. Cohen, Regent

Albany, New York

February 5, 1997

1. The stenographic transcript of the hearing will be referred to herein as "Tr." followed by a page number. Exhibits will be referenced as "Ex. P" for petitioners' exhibits, and "Ex. R" for respondents' exhibits, followed by a number.

2. On July 29, 1996, the respondent trustees brought an Article 78 proceeding pursuant to the Civil Practice Law and Rules, seeking to enjoin the Regents' hearing under Education Law §226(4). Motions for a temporary restraining order were denied by the Supreme Court, Special Term and Supreme Court, Appellate Division, Third Department, on July 29 and August 1, respectively. Leave to appeal the denial of the temporary restraining order was denied by the Appellate Division, Third Department on August 5. The Article 78 petition was dismissed on the merits by Special Term on August 21, and on September 6 the Appellate Division, Third Department refused to grant a temporary restraining order pending appeal of the dismissal of the petition. On January 23, 1997 the Third Department unanimously affirmed Special Term's dismissal of the petition.

3. While Silber in 1994 had apparently independently gathered some data on presidential salaries in an attempt to defend himself against public accusations that he was the highest paid university president in the United States, he did not recall sharing that information with the committee. Tr. 1607, 1777. Indeed, no committee member testified to considering Silber's materials or other comparable salary information. Moreover, Silber's salary information was not for "comparable" institutions, as Silber indicated that, in his view, there is no university in the country comparable to Adelphi. Tr. 1818.

4. Diamandopoulos testified that he waived in perpetuity the right to this reimbursement. Exs. P-238-239.

5. This provision is made applicable to education corporations by Education Law §216-a. Pursuant to Education Law §216-a, the N-PCL generally applies to education corporations, with certain exceptions not relevant here.

6. The board's June 1996 approval of Diamandopoulos' compensation retroactive to March 1994 does not cure its initial failures to act with reasonable care. The fact that the board saw fit to affirm some earlier trustee actions once they came under scrutiny by the Attorney General and the Board of Regents does not cloak those actions with the virtue of due care, which must be exercised during the decision making process, not after the fact.

7. We do not find that the board of trustees could not have delegated to an appropriately comprised ad hoc committee the authority to review and advise the full board on the President's compensation. However, that committee would have to be established by vote of the board of trustees, not by the unilateral act of chairman Byrne. See Adelphi Bylaws, Article IX, §1. Moreover, as discussed above, under N-PCL §715(f) and Article II, §3(9) of the Bylaws, the full board of trustees must ultimately fix and approve any recommendations made by the committee. Finally, the committees could only act without a formal meeting if all committee members consented in writing and filed that consent with the board. Article VII, §1. The trustees failed to follow each of these provisions.

8. Before the board had even authorized the purchase, Diamandopoulos had apparently already begun searching for an apartment. Tr. 285. In fact, the record shows that Diamandopoulos received the offering amendments for the East 72nd Street apartment on April 23, 1993 -- two weeks before the board resolved to acquire an apartment. Tr. 298; Ex. P-26. The deed to the apartment was executed by Diamandopoulos on May 10, 1993 -- only five days after the resolution passed. Tr. 300; Ex. P-77.

9. The trustees argue that a 1995 comparison of comparable properties shows the March 1994 value of the East 72nd Street apartment at \$900,000. Ex. P-82. Even if true, the fact that the trustees may have fortuitously chosen the correct sale price does not relieve them of their legal responsibility to make informed decisions in the University's best interest. Moreover, there is no competent evidence in the record showing that this was, in fact, the correct value, or that the 1995 comparison took into account \$190,000 in improvements and furnishings. Indeed, a September 1993 appraisal obtained six months prior to the execution of the option, valued the apartment at \$1.05 million, not including improvements and furnishings. Ex. P-220. Finally, in our view, if a board acting in the interest of the University granted Diamandopoulos an option to purchase the apartment, it would do so at fair market value, to be determined by an impartial appraiser at the time of the exercise of the option.

10. Adelphi should have also been less vulnerable to the purportedly changing demographics on Long Island because, according to the trustees, it was an institution with a national reputation, drawing students from across the country, not from just Long Island, or even New York State.

11. Even when divorced from accomplishments and measured with the objective yardstick used by the trustees' own witness, David Brown, Tr. 6975-6977, Diamandopoulos' salary is unreasonable. For 1994-1995, Diamandopoulos' base salary alone was more than two standard

deviations above the mean for presidents at other doctoral institutions, a measure witnesses for both sides agreed was appropriate to determine presumptive reasonableness. Tr. 6960, 7706-7707.

12. After the close of the hearing, the trustees submitted the affidavit of Harry M. Ennevor, the Executive Vice President of Bowman. It seems to state that Bowman receives commissions based on the profitability of a broker's entire portfolio, and not on policy premiums paid by any particular insured. However, it is unclear whether this statement pertains to Bowman's arrangements with Adelphi prior to 1996. Moreover, to the extent the affidavit may conflict with the live testimony of Procope and Charron, we give more weight and credence to the live witness testimony, which was subject to direct and cross-examination.

13. While Hennessy testified that she reported to the full board in February 1987 that a broker of record letter had been issued for 1986-1987, Tr. 960, this is not supported by the board minutes. Even if she did make such a report, it covered only one year, and did not apprise the board that Bowman was being paid for its services.

14. Diamandopoulos' explanation strains credulity because the labor contract was subject to renegotiation only once during the five year period of non-compliance. Tr. 530.

15. In light of this result, we do not reach the fifth cause of action in the petition.