



**DEPARTMENT OF JUSTICE
CIVIL ENFORCEMENT DIVISION**

May 19, 2021
VIA EMAIL ONLY

ElderHeart, Inc. (DBA "Mission 22")
694 N Larch St., #910
Sisters, Oregon 97759
magnus@mission22.com
mike@mission22.com
randy@mission22.com

Re: ElderHeart Inc. (DBA "Mission 22")
DOJ Matter No. 137300XCT0036-20

Dear Board of Directors:

This letter constitutes the report of the investigation into ElderHeart, Inc. (DBA "Mission 22") by the Charitable Activities Section of the Oregon Department of Justice ("the Department"). This report is a public record. As described below, the Department recommends certain changes to ElderHeart's ongoing governance and operations. In addition to a number of secondary concerns, our primary recommendations include ensuring that all conflict-of-interest transactions are treated in compliance with ORS 65.357 and 65.361, and that ElderHeart's resources are used to further its charitable mission rather than private interests.

This report is based on the records provided by ElderHeart, interviews with complainants, publicly available documents and information, and the Department's own research and analysis. This report should be shared with all board directors.

I. Introduction

The Attorney General is responsible for supervising charitable organizations holding or soliciting assets in Oregon. *See* ORS 180.060; ORS 128.610, *et seq.*; ORS Chapter 65. This responsibility includes the power and duty to investigate whether charitable organizations are carrying out their charitable missions or breaching any fiduciary duties arising under statutory or common law. ORS 128.680. The Charitable Activities Section of the Department performs these duties on behalf of the Attorney General.

The Department initiated its review of ElderHeart after receiving complaints from private individuals. After interviewing the complainants and reviewing publicly available documents, the Department opened an investigation of the organization. We requested information from the organization via an Order to Attend and Produce Documents ("the Order") dated January 4, 2021. The Order requested that ElderHeart produce sixteen categories of documents before February 5, 2021. ElderHeart provided its initial responsive documents via a series of digital file

transfers during the last two weeks of January 2021. After reviewing the organization's initial production, the Department requested that ElderHeart supplement its production to correct certain omissions and to provide the Department with additional information. The organization produced further documents and information in a rolling production that concluded on April 7, 2021. In total, ElderHeart produced approximately 110 documents, and provided to the Department access to the organization's online bookkeeping program from which we extracted approximately 20 customized reports.

This report explains the Department's findings to ElderHeart's board of director, communicates our concerns about the organization's activities, and provides guidance and requirements for ElderHeart's future practices.

II. ElderHeart Background

ElderHeart, Inc. incorporated as a charitable corporation in Indiana in 2013 and received recognition the same year from the IRS as a tax-exempt public charity under IRC § 501(c)(3), further classified as type 170(b)(1)(A)(vi). Its Form 1023 Application for Recognition of Exemption states that the organization's primary exempt purpose is to help "warriors returning from war deal with the emotional, physical and psychological trauma that follows such men and women from the battlefield" via two primary activities: public art projects, and the establishment of a retreat center in Morganton, NC. ElderHeart's Form 1023 additionally states that the organization will "limit its services to veterans who have served in the US military."

Since at least 2014, ElderHeart has operated under the assumed business name of "Mission 22" in honor of the estimated 22 veterans who commit suicide each day. In 2016, ElderHeart began filing the annual report Form CT-12F to the Department. In 2017, ElderHeart re-located to Oregon where it incorporated as an Oregon domestic nonprofit (rather than as a foreign nonprofit transacting business in Oregon). It was based in the Portland metropolitan area until 2020, when it relocated to Sisters, Oregon.

ElderHeart publicizes that it works to eliminate military suicide and to lessen the impacts of post-traumatic stress disorder, traumatic brain injury, and mental illness in those who have experienced combat or other military trauma. Its branding includes the tagline "Mission 22 – United in the War Against Veteran Suicide." Its current active programs include "Recovery + Resiliency" which provides biometric equipment, nutritional supplements, and supportive resources to veterans; providing sponsorships for veterans to join a fitness program; "Vets Feeding Vets," which provides grocery-store gift cards to veterans experiencing financial hardship due to the COVID-19 pandemic; the "Mission 22 Wellness Program," which provides free "mental wellness" supplements from Amare Global; and the "Mission Troopers Equine Program," which provides horseback riding lessons to children of veterans. Its online store sells clothing and other Mission 22 promotional gear. The organization also mobilizes an "Ambassador" network of veterans across all U.S. states through social media, fundraising events, and gatherings.

ElderHeart was founded by three combat veterans including Magnus Johnson, who currently serves as both the organization's board president and its paid Chief Strategy Officer. Mr. Johnson is married to Sara Johnson (formerly Sara Dawdy) who has served as the organization's paid Chief Executive Officer since 2012.

III. Findings

A. Related Party Transactions

Key staff and board positions at ElderHeart are held by related parties who have engaged, or are currently engaging, in numerous transactions with the organization. In general, transactions between a charity and board directors, their families, and their businesses should be avoided. Under certain circumstances, any organization may conduct these types of transactions but only if they are approved in accordance with Oregon law and the organization's governing documents; the latter may impose stricter standards than state statute. *See* ORS 65.357; ORS 65.361.

ElderHeart has three board members and approximately 10 employees, five of whom are related to each other. The related parties identified to date are as follows:

- Sara Johnson is employed as ElderHeart's CEO, is married to Magnus Johnson and related to three other ElderHeart employees, is a member/manager of Borne Wilder LLC, and is ElderHeart's tenant.
- Magnus Johnson is ElderHeart's board president, is employed as its CSO, is married to Sara Johnson, is a member/manager of Borne Wilder LLC, was engaged in a lease agreement with ElderHeart, and is ElderHeart's tenant.
- Cindy Stinson is Ms. Johnson's mother, is employed as the organization's Ambassador Program Director, and is engaged in a lease agreement with ElderHeart.
- Diane McCall is Ms. Johnson's aunt, is employed as the organization's Public Relations Director, and is engaged in a lease agreement with ElderHeart.
- Jessica "Jess" Roux is Ms. Johnson's stepsister, is employed as the organization's Office Manager, and is engaged in a lease agreement with ElderHeart.
- Michael "Mike" Kissel is ElderHeart's board vice president, is an independent contractor for the organization, and is a member/manager of Mindhale LLC.
- Leonard Bradley "Brad" Hubbard is a former board director and was an independent contractor for the organization.
- Borne Wilder LLC is an Oregon Limited Liability Company that supplies book inventory for the ElderHeart store.
- Mindhale LLC is an Ohio Limited Liability Company that is engaged in a lease agreement with ElderHeart.

1. Improper Disclosure of Related Transactions

The organization has failed to properly disclose in its IRS Forms 990 the relationships and financial transactions with these related individuals and entities. Listed below are failed disclosures the Department has identified to date. The period of review is for tax years 2017, 2018, and 2019.

- a) Form 990 Part I, Part VI, and missing Schedule L: Magnus Johnson is identified as an independent voting board director every year. However, he does not qualify as independent because he is a paid employee, his relatives are paid employees, he is a vendor to the organization, and he has reportable Schedule L transactions with the organization.
- b) Form 990 Part VII: no compensation is reported for board director Mike Kissel. However, he received payments as an independent contractor in 2017 and rent was paid to his business Mindhale LLC in 2018 and 2019.
- c) Form 990 Part VII: no compensation is reported for board director Brad Hubbard. However, he received payments as an independent contractor in 2017.
- d) Form 990 Part VII: Sara Johnson is not reported as an officer and key employee of the organization prior to 2018. However, IRS Form 990 instructions require that she is listed in Part VII as she has served as the organization's CEO since at least 2013. Her relationship to Magnus Johnson is also not disclosed until 2018.
- e) Schedule L is not prepared. However, the organization appears to have engaged in multiple reportable Schedule L transactions such as purchasing merchandise from Borne Wilder, LLC (an entity owned by the Johnsons) that exceeded reporting thresholds in at least 2017 and paying compensation to relatives of the Johnsons that exceeded reporting thresholds in all three years of the period of review.

2. Improper Handling of Conflicts of Interest

Oregon law imposes requirements regarding director conflicts of interest. In addition, the organization's bylaws include a detailed Conflict of Interest policy. However, based on board minutes and financial records produced by the organization, ElderHeart has failed to follow this policy or adequately to document its compliance and review of the policy. Specific concerns are detailed below.

- a) On 6/9/2017, the board approved an amendment of bylaw section 3.15 such that the board can fill any board seat "with the CEO having the swing vote." The minutes do not mention that the CEO is married to the board president, nor do the minutes document any consideration of the potential conflicts inherent in this amendment.
- b) On 8/20/2017, the board approved the sale of the "Mission 22 book" on the vote of a single director (Hubbard), with the "proceeds going to ElderHeart." Mr. Johnson recused himself from the vote because he wrote the book, and Mr. Kissel recused himself because he financed the book. The organization does not appear to appreciate that under

Oregon law, a single director can't approve a conflicted transaction (ORS 65.361(5)). ElderHeart's accounting records show more than \$50,000 in payments were made to Borne Wilder LLC (Magnus and Sara Johnson's company) to purchase book inventory.

- c) On 5/8/2019, the board approved a raise for CEO Sara Johnson. Her husband Magnus Johnson voted to approve the raise, no conflict was declared, and Mr. Johnson did not recuse himself from the discussion or voting. In the same meeting, the board approved a raise for Mr. Johnson as well; Mr. Johnson did not vote but does not appear to have recused himself from the discussion.
- d) On 8/26/2019, the board voted to make Sara Johnson its "Amare rep" for the purpose of ElderHeart's purchase of supplements from Amare Global, a multilevel marketing ("MLM") entity, for the veterans' health program. Mr. Johnson did not vote on the issue, but no discussion is captured regarding the conflict of the CEO acting as a representative for one of the organization's highest-paid vendors. The Department understands, based on subsequent board minutes, that Ms. Johnson's role in the transactions with Amare was short-lived.
- e) On 4/23/2020, the board voted to authorize Magnus and Sara Johnson to identify and purchase land and buildings on behalf of ElderHeart. Mr. Johnson did not vote but did not recuse himself from the discussion. On 6/17/2020, the minutes state simply that "ElderHeart has obtained a new property for the office and ElderHeart programs." No discussion is recorded regarding the Johnsons' intent to live on the property that they selected; the pending rental and caretaking agreements between ElderHeart and the Johnsons; how the organization justified spending \$1.3 million for the purchase of, relocation to, and improvements at this property; or how the organization's stated exempt purpose aligns with the residence and children's equine program that the new property will accommodate.
- f) No discussion or approval of rental agreements with related parties is noted in any of the produced board minutes. However, the organization's records confirm that it has or had lease or rental agreements with five employees (Magnus Johnson, Sara Johnson, Cindy Stinson, Diane McCall, and Jess Roux) and Mindhale LLC (controlled by board director Michael Kissel). The lease agreements with employees purportedly are payments for the employees' home use of office space, but it is notable that the only ElderHeart employees with rental or lease agreements with the organization are relatives of the CEO.
- g) Review of bank records shows that Magnus and Sara Johnson sign checks to each other with no co-signer or other evidence of independent approval.
- h) The lease documents produced by ElderHeart displayed a concerning number of errors and inconsistencies including erroneous dates, missing signatures, and signature pages that do not match the agreement itself. Each individual error may not be significant in isolation, but in totality (and in combination with the bylaw signature inconsistency described in a later section) these errors cast doubt on the organization's recordkeeping and the validity of its agreements.

3. Mishandling of Issues Relating to Sisters, Oregon Property

The foundational requirements of tax exemption under IRC § 501(c)(3) include that the organization must be organized and operated exclusively for exempt purposes and none of its earnings may inure to any private individual. It must not be organized or operated for the benefit of private interests. Significant expenditures by ElderHeart in the past year appear to align more with private interest than charitable interests, which may be grounds for additional scrutiny of the numerous other related-party transactions previously described. The Department's primary concern is related to the property in Sisters, Oregon, as detailed below.

- a) Magnus and Sara Johnson and their family and pets live on property ElderHeart purchased May 27, 2020. The 10-acre property in Sisters, Oregon includes a large residence, a second smaller house for ElderHeart offices, a barn and other outbuildings, fenced animal enclosures, and pastureland. Board minutes indicate that the Johnsons were given carte blanche to select any property they wanted. ElderHeart paid nearly \$1 million for the property itself and more than \$300,000 for moving expenses, horses, fencing, and other property-specific assets such as two all-terrain vehicles, two horse trailers, and a skid-steer loader. This \$1.3 million cash outlay by ElderHeart represents almost 90% of the organization's total net assets at 12/31/2019, yet it appears to serve only the Johnsons and about twenty horse-riding children of the Sisters region. None of the organization's known services to veterans require a 4-bedroom home or a 10-acre horse farm. This significant use of charitable funds does not appear to further the exempt purpose stated in ElderHeart's Form 1023 and indeed contradicts the Form 1023 statement that it will "limit its services to veterans who have served in the US military."
- b) In exchange for caring for the horses at the Sisters property, the Johnsons receive, in addition to their salaries from ElderHeart, a significant rent reduction such that their monthly payment is \$460 (reduced from \$2,500) for a 4+ bedroom home, the convenience of immediate proximity to their work office, personal use of ElderHeart assets, and the fulfillment of their reputed desire for rural living regardless of the impact to the organization. Rental rates for similarly appointed homes on smaller acreage in the Sisters region range from \$3,900 to \$9,500 per month, which is substantially less than the Johnsons' \$2,500 nominal rent, without taking into account their caretaking credit. This arrangement may qualify as an excess benefit transaction and may subject the organization to federal excise taxes or enforcement action. *See* IRC § 4958.

B. Governance and Oversight

In addition to the disclosure failures and conflicts of interest described in the prior section, ElderHeart's annual reports (consisting of Forms CT-12F, Forms 990, and audit reports) display numerous potential errors, as listed below.

- a) In Part III of the Form 990, ElderHeart has never disclosed any new significant program services or significant changes to its program services. However, the majority of its

current activities and major expenditures relate to programs that are not listed in its Form 1023 or its formative documents.

- b) In Part IX of the Form 990, functional expense allocation is not appropriate or reasonable. Virtually all of the organization's revenue is from contributions, and it maintains at least one full-time development employee, yet zero expenses are allocated to fundraising.
- c) In the Form 990, the organization reports that no review of the Form 990 is or will be conducted.
- d) In the Form 990, the organization reports that no compensation review is conducted. This conflicts with ElderHeart's production which claims that the Johnsons' salaries are based on comparable organizations in GuideStar reports.
- e) In the Form 990, the organization reports that it has no whistleblower policy and no document retention policy.
- f) In the Form 990, the organization reports that Indiana is the only state where it is required to file the Form 990. However, it is clearly required to file with Oregon, and in other documents it states that it conducts activities and raises funds in all 50 states which generally requires extensive additional state reporting.
- g) The organization's accounting records, as well as open-source documentation, indicate that it raises funds for specific purposes. However, it consistently reports zero temporarily restricted net assets (now known as "net assets with donor restrictions") in both its Forms 990 and its audited financial statements.
- h) The board directors listed in the Form 990 are different from the directors listed in the organization's produced documents. This indicates that ElderHeart is not reporting the directors in accordance with IRS instructions.
- i) The organization's IRS determination letter states it is a type 170(b)(1)(A)(vi). However, the organization consistently reports in Schedule A that it is a type 509(a)(2).
- j) ElderHeart's Form CT-12F declares that it is a foreign corporation doing business in Oregon, reports limited Oregon income, and reports zero Oregon assets. However, its website states that it has relocated to Oregon; its primary offices are located in Oregon; it owns substantial assets in Oregon; donations are directed to an Oregon address; and participation in on-site programming such as horse-riding is limited to Oregon locations.
- k) During the early months of the pandemic in 2020, ElderHeart applied for and obtained a \$108,700 PPP loan and a \$100,000 line of credit from its bank. However, the organization's unaudited accounting records indicate that ElderHeart's 2020 revenue exceeded its pre-pandemic income by 33% and at 12/31/2020 it held over \$1.5 million unrestricted cash in its bank accounts.

C. Mission Drift

ElderHeart was recognized by the IRS as a tax-exempt public charity based on the representations made in its Form 1023 Application for Recognition of Exemption. Deviations from these representations and significant changes to the organization's governing documents must be disclosed in the organization's annual Form 990. Although ElderHeart appears to have made significant changes to its Form 1023 representations, the organization has not disclosed any changes in its Forms 990. These concerns are described in more detail below.

- a) ElderHeart's Form 1023 states that the organization's primary exempt purpose is to help "warriors returning from war deal with the emotional, physical and psychological trauma that follows such men and women from the battlefield" via two primary activities: public art projects, and the establishment of a retreat center in Morganton, NC. The Form 1023 also states that Tom Spooner (founding board member) had committed to donating 2.5 acres of land for the Retreat Center. The Center was described as a place of treatment and healing for veterans which would be built by veterans and staffed by trained medical personnel. Based on Forms 990 and documents produced by the organization, it has never established a Retreat Center in North Carolina or anywhere. It has constructed two major sculptures, one of which is in Indiana and the second of which traveled to several locations before being installed at its permanent home in Oklahoma. These art projects have taken a back seat to ElderHeart's newer initiatives including its social impact programs and children's horseback riding. Art projects represented just 4% of total program spending in the most recent (2019) Form 990.
- b) The organization's Form 1023 states that it will not purchase any goods, services, or assets from any officers, directors, or highest compensated employees, nor will it enter into any leases, contracts, loans, or other agreements with the same. However, produced documents show that ElderHeart has purchased goods from the Johnsons; hired board directors as independent contractors; made lease payments to directors, officers, and key employees; and currently rents property to the Johnsons.
- c) The bylaws attached to the Form 1023 state in section 3.2 that "staff members employed by the Corporation shall not be eligible for election to the Board," yet the board President is a long-term and highly compensated employee of the organization. When the organization registered in Oregon, the version of the bylaws submitted to the Department had been amended, including the removal of this sentence, but no disclosure of this change is noted in ElderHeart's Forms 990. It is unclear if these amendments were properly adopted, as the signature page attached to the bylaws submitted to DOJ is an exact copy of the signature page submitted with its Form 1023 version of the bylaws and clearly does not correspond to the amended version of the bylaws.
- d) The Form 1023 states that the organization will "limit its services to veterans who have served in the US military." However, in 2020 ElderHeart spent virtually all its 2019 net assets for a program that will only benefit a small group of children via free horse-riding lessons.

IV. Conclusion, Recommendations, and Requirements

The Department's investigation of ElderHeart identified two primary concerns, for which we recommend immediate and extensive reforms by the board of directors.

- 1) **Related Party Transactions.** The number and extent of related party transactions, along with the lack of adequate documentation of how such concerns were considered and addressed by independent board directors, raises concern about the organization's ability to make decisions that are free from private interests. ElderHeart's board president and CEO are married, receive generous salaries, are related to half of the staff, receive book revenue from the organization, control almost all aspects of the organization, receive extensive personal benefit from the organization's assets, and used \$1 million in organizational funds to purchase a hand-picked home in a transaction that does not appear to further ElderHeart's exempt purpose. These transactions may have been tacitly approved by the board, but the required discussion and justification of each transaction was not found.

Although there may exist close personal relationships and mutual trust within the organization's leadership, the board must consider these transactions from the viewpoint of an objective outside observer. As a public charity, ElderHeart cannot make decisions based on personal relationships but must instead consider its legal obligation to operate solely in furtherance of its exempt purpose. ElderHeart's governing documents already include a detailed Conflict of Interest policy which, if followed, would provide substantial compliance with state and federal requirements. The board should review, follow, and scrupulously document its compliance with this policy and with state and federal law. The board should also review its statutorily required duties of loyalty, due care, and obedience which require that, in all decisions, the organization's mission takes precedence over any private interests. *See, e.g.,* ORS 65.357, ORS 65.361, ORS 65.367 ORS 65.377. These duties are more fully explained in the enclosed "Guide to Nonprofit Board Service in Oregon." The Department has authority to take legal action to recover funds if proper conflict of interest procedures are not followed and the transactions are not fair to the organization.

Unless conflict-of-interest transactions are properly approved, they may be grounds for imposing liability if they are not fair to the organization. *See* ORS 65.361(1). On its face, as well as in light of known circumstances, the discounted rent paid by the Johnsons for the Sisters, Oregon residence appears unfair to ElderHeart. The Department urges the board to reconsider the terms of this arrangement and establish a rental agreement in line with local real estate market conditions. In addition, the board should be aware that the IRS may view the rent discount as a taxable fringe benefit or a taxable barter transaction, as well as an excess benefit transaction. To the extent that they do not already report the rental discount as personal income, the Johnsons may wish to consult with a tax professional for guidance.

- 2) **Charitable Mission.** ElderHeart must operate exclusively for its exempt purpose and not for private interests. The exempt purpose proclaimed in ElderHeart's formative documents does not align with its current use of resources, which calls into question the suitability of the organization's public charity status. ElderHeart's tax exemption under IRC § 501(c)(3) is the exclusive purview of the IRS and our office has no authority to revoke a charity's federal exempt status. However, please be aware that federal law runs parallel to many of the Oregon charitable requirements described in this letter.

In addition to the principal concerns identified above, the Department has identified several secondary concerns and related requirements as detailed below.

- 3) **Incorporation error.** ElderHeart is currently incorporated as two separate domestic nonprofit corporations using the same EIN, one in Indiana and the second in Oregon. According to its CEO, ElderHeart's second domestic incorporation in Oregon was made in error. The Oregon corporation is currently administratively dissolved for failing to file annual reports with the Oregon Secretary of State. Our office requested that the organization continue to file annual reports with the Secretary of State, pending completion of our review, but it is possible that the organization may have misunderstood our request. In light of the organization's extensive ties to Oregon, it may be appropriate to dissolve the Indiana corporation and seek reinstatement of the Oregon corporation. In any event, if the directors intended to dissolve the Oregon corporation, the proper way to do that is to file articles of dissolution. Letting the Oregon corporation's status lapse through administrative dissolution creates ambiguities regarding directors' intentions and the organization's status.
- 4) **Form 990 errors.** ElderHeart's annual reports display a number of potential errors and inconsistencies, as detailed above in Sections III.A.1 and III.B of this letter. The Department requests that ElderHeart review relevant IRS instructions and publications and correct its future filings accordingly. Items of particular importance include proper disclosures related to director independence and conflicts of interest in Parts I, VI, VII, and Schedule L, and the proper allocation of functional expenses in Part IX.
- 5) **Annual CT-12 reports to the Department.** Since 2016, ElderHeart has filed the annual report Form CT-12F to the Department. The organization has claimed roughly 1% of its total revenue on line 9 (Total Oregon Revenue) and has consistently claimed \$0 on line 11 (Oregon Net Assets). However, it is clear that the organization has relocated to Oregon, its primary offices are located in Oregon, it owns substantial assets in Oregon, its CEO and president are permanent Oregon residents, donations are directed to an Oregon address, and participation in on-site programming is limited to Oregon locations. As such, the organization is headquartered in Oregon for purposes of annual reporting requirements. Regardless of whether ElderHeart elects to remain incorporated in Oregon or Indiana, in the future, our office will require the organization to complete a CT-12, rather than a CT-12F and to report its total revenues and assets from all sources on the appropriate lines of the CT-12. See OAR 137-010-0020(3).

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The Department hopes that ElderHeart's board of directors reviews carefully the information in this report and implements appropriate reforms. The Department will continue to monitor ElderHeart for compliance with the requirements and recommendations of this report and with applicable state law.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Kleyna', written in a cursive style.

Mark Kleyna
Assistant Attorney General

Enclosure: Guide to Nonprofit Board Service in Oregon