



Fire cider ingredients in a mason jar ready to infuse for three to four weeks. Photo ©2020 Gayle Engels



Fire cider preparation. Photo ©2020 Gayle Engels

FREE FIRE CIDER

Traditional Remedy Remains Generic after Landmark Case

By Hannah Bauman

The Story of Fire Cider

In winter 1979-1980, herbalist and teacher Rosemary Gladstar sought a non-alcoholic tonic to support the immune system during the long, damp winters in northern California. With the input of her students at the California School of Herbal Studies in Forestville, California, and inspired by similar vinegar-based products from folk medicine practitioners D.C. Jarvis, MD, and John R. Christopher, ND, Gladstar went to the grocery store and purchased hot, fiery herbs, including garlic (*Allium sativum*, Amaryllidaceae), horseradish (*Armoracia rusticana*, Brassicaceae), onion (*Allium cepa*), and ginger (*Zingiber officinale*, Zingiberaceae).

“It was a very creative process,” Gladstar recalled (oral communication, December 6, 2019). With her students, she added the ingredients to apple (*Malus* spp., Rosaceae) cider vinegar and let it sit for four or five weeks. “It wasn’t quite perfect. We added honey to mellow the hot flavors and we knew then that we had something here.” She dubbed the tonic “fire cider.”

In 1981, Gladstar included a recipe for fire cider in the first edition of her home study course, *The Science and Art of Herbalism*. Her students shared it widely and began making their own, with variations according to preference. “It developed a life of its own, as herb formulas should,” she said. The reasons? “It worked, it was inexpensive, the ingredients were easy to find, and anyone could adjust the flavors

Rosemary Gladstar's Original Fire Cider Recipe

Ingredients

- 1/2 cup grated horseradish root
- 1/2 cup or more chopped onion
- 1/4 cup or more chopped garlic
- 1/4 cup or more grated ginger
- Cayenne pepper, either dried and powdered or fresh and chopped, to taste
- Unpasteurized apple cider vinegar
- Raw honey

Directions

1. Place herbs in a half-gallon canning jar and add enough apple cider vinegar to cover the herbs by at least three to four inches. Cover with a tight-fitting lid.
2. Place jar in a warm location and let it infuse for three to four weeks. It is best to shake every day to help with the maceration process.
3. After three to four weeks, strain out the herbs and reserve the liquid.
4. Add honey to taste. The fire cider should taste hot, spicy, and sweet.
5. Rebottle and enjoy. Fire cider will keep for several months unrefrigerated if stored in a cool pantry, but refrigeration is recommended.

Source: Rosemary Gladstar's *The Science and Art of Herbalism*



Honeycomb
Photo ©2020 Steven Foster



Ginger *Zingiber officinale*
Photo ©2020 Steven Foster



Horseradish *Armoracia rusticana*
Photo ©2020 Anna Reg



Cayenne *Capsicum annuum*
Photo ©2020 Steven Foster



Onion *Allium cepa*
Photo ©2020 Steven Foster

easily.” Fire cider continued to be a mainstay of Gladstar’s winter health classes. She included the recipe for fire cider in several of her books, including *Rosemary Gladstar’s Herbs for the Home Medicine Chest* (Storey Books, 1999) and a variation that added ginseng (*Panax* spp., Araliaceae), which she called “fire cider zest,” in *Rosemary Gladstar’s Herbs for Longevity and Well-Being* (Storey Books, 1999).

Fire Cider Trademark Granted

On April 20, 2012, the Pittsfield, Massachusetts-based company Shire City Herbals (SCH) filed for a registered trademark for “Fire Cider” from the US Patent and Trademark Office (USPTO) as they sought to market their own spicy and sweet apple cider vinegar formulation made with garlic, ginger, onion, horseradish, habanero pepper (*Capsicum chinense*, Solanaceae), turmeric (*Curcuma longa*, Zingiberaceae), black pepper (*Piper nigrum*, Piperaceae), lemon (*Citrus × limon*, Rutaceae), and orange (*Citrus × sinensis*).^{1,2} Though SCH’s application could have been opposed after the trademark’s publication on October 2 of the same year, Gladstar claims that no one in the herbalist community was aware of the action, and no opposition petitions were filed. The trademark officially was registered by USPTO on December 18, 2012.

SCH was founded in 2010 by Dana St. Pierre, his wife Amy Huebner, and Amy’s brother Brian Huebner. None of the co-founders have a background in herbalism, though Amy Huebner has an education and background in nutrition and integrative health.³ The story of St. Pierre’s introduction to fire cider has varied: On SCH’s website, his biography states that the initial recipe came from his German grandmother and he experimented to create his own blend; later, he was informed that the mixture was called fire cider by a man (“a hippie,” in St. Pierre’s words) at a potluck in 1997.^{4,5} A representative for SCH did not respond to repeated requests for comment for this article.

After the opposition period had passed, SCH began contacting other purveyors of fire cider and asking them to rename their products, but refrained from formal legal action. According to Gladstar, these letters were civil and non-threatening (although some of the recipients thought otherwise) and did not constitute a legal cease-and-desist notice. Many herbalists became aware of the trademark for the first time after SCH notified Etsy, an online marketplace, of the trademark and the website took down all the non-SCH product listings in violation (i.e., those that appeared to infringe on SCH’s trademark).

Katheryn Langelier of Herbal Revolution Farm and Apothecary in Union, Maine, received a takedown notice from Etsy and described seeing a notification that SCH sent to businesses directly: “It wasn’t a legal document..., but [SCH was] nonetheless letting people know, without coming out and saying it, ‘If you continue to use this, there will be issues,’” said Langelier (oral communication, December 13, 2019). “Most herbalists I know who received that notice stopped using the term ‘fire cider.’” Initially, Langelier did as well, changing the name of her product from “fire cider” to “fire tonic.” “I did [change it] because I did not have the money for a lawsuit,” she said.

The Battle for Tradition

Mary Blue, owner and founder of Farmacy Herbs shop and school in Providence, Rhode Island, learned of the trademark in January 2014 and launched a change.org petition to raise awareness and gain support for cancelling SCH’s trademark (oral communication, December 17, 2019). The petition gained more than 11,000 signatures and, as of the time of writing (January 2020), has grown to almost 16,000, despite the outcome of the case being decided in September 2019.^{5,6} After the petition was launched, Nicole Telkes, founder and director of the Wildflower School of Botanical Medicine in Austin, Texas, contacted St. Pierre by email and asked him to give up the trademark; a company representative responded that they would seek legal advice before proceeding.

Blue commented: “[SCH] never communicated with my business directly, but I did receive a notice from Etsy. I was really surprised that the trademark office approved it. Then I thought, perhaps there was a mistake. Maybe the company didn’t realize? Those were my first thoughts. Then I was upset.”

After the petition and unsatisfied with the response from SCH, a group of herbalists including Blue, Telkes, Langelier, and Gladstar formed “Tradition Not Trademark,” a group whose goal was to remove trademark restrictions from fire cider. Tradition Not Trademark launched a boycott against SCH and founded the “Free Fire Cider” website to expand the effort. Free Fire Cider urged people and businesses to boycott SCH and file cancellation petitions with the US Trademark Trial and Appeal Board (TTAB), and encouraged herbalists to continue selling fire cider preparations under the name “Fire Cider.” Eventually, these actions would inform five of the 10 counts SCH



Sticker created by Mountain Rose Herbs in support of the Free Fire Cider movement. Photo by Amanda Mura, courtesy of Mountain Rose Herbs

(Left to right) The "Fire Cider Three" — Nicole Telkes, Kathryn Langelier, and Mary Blue — and Rosemary Gladstar.
Photo ©2020 Nicole Telkes

initially brought against the defendants. When pressed for comment by Tradition Not Trademark, SCH indicated that it would accept a ruling from the TTAB if the body decided to cancel the trademark.

"[SCH] said, 'if we don't trademark it, some big company will,'" Gladstar recalled. "What they didn't seem to understand was that to the herbalist selling in a farmers' market, they are the big company.... Shire City didn't know that they were riding on the shoulders of others and a 40-year tradition. They were very surprised by the backlash and didn't anticipate it."

In June 2014, Blue, representing Tradition Not Trademark, filed a cancellation petition with the TTAB. During this time, the Free Fire Cider movement continued to encourage consumers and retailers to boycott SCH, offering sample scripts on how to request that SCH products be removed from shelves and replaced with a different brand. On April 16, 2015, SCH filed a lawsuit against Blue, Telkes, and Langelier in the US District Court of Massachusetts on 10 counts:

- Claim I: Declaratory judgment that the mark is distinctive and valid;
- Claim II: Trademark infringement;
- Claim III: False designation of origin;
- Claim IV: Trade disparagement;
- Claim V: Common law trademark infringement;
- Claim VI: Common law unfair competition;
- Claim VII: Unfair trade practices;
- Claim VIII: Tortious interference with contractual relations;
- Claim IX: Tortious interference with prospective business relations; and
- Claim X: Trade libel.

SCH sought more than \$100,000 in damages plus any profits that the defendants made from selling fire cider. In response to the lawsuit, TTAB suspended cancellation actions pending the outcome of the case. After being named in the lawsuit, Blue, Telkes, and Langelier became known as "the Fire Cider Three" and began a fundraising campaign to offset legal costs.

Blue was the first defendant to receive the initial filing. "I was helping a customer and a constable walked into my herb shop and served me papers," she said. "I was surprised, and scared, because the lawsuit was alleging \$100,000 worth of damages related to the boycott.... I've known Nicole since the early 2000s and I've known Kathi a long time, too. They didn't know each other, but I immediately



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took some pictures of the front page [of the filing] and texted it [to them] and called them. They hadn't received it yet."

The three defendants then filed two counterclaims:

- Counterclaim I: Declaratory judgment that the mark is generic or descriptive without secondary meaning; and
- Counterclaim II: Unfair and deceptive acts or practices in violation of Massachusetts' consumer protection statute.

Telkes commented: "We were encouraged to file a cancellation petition if we didn't like the trademark and spent several months looking for legal help. The lawsuit was filed against us just before Shire City's evidence was due to the TTAB" (email, January 31, 2020).

Shire City's Plaintiff Argument

In its initial filing, SCH alleged that the defendants had violated a valid trademark and undercut the company's profits by selling their own versions of fire cider, and additionally had damaged the company's reputation and sales

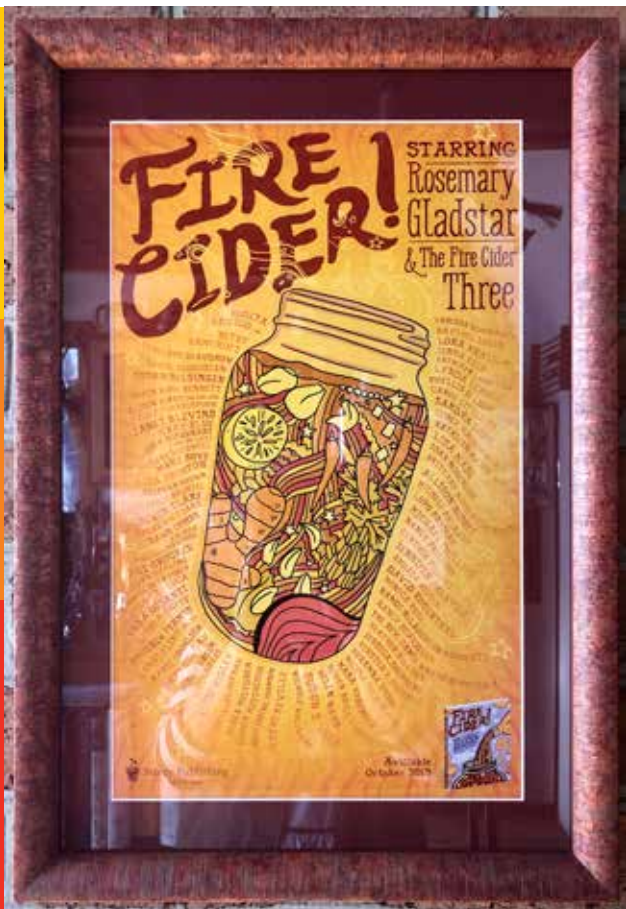


Photo of a framed poster by Storey Publishing that includes the names of all who contributed recipes to the book *Fire Cider*. Photo ©2020 Susan Belsinger

“It was intense, arduous, outside of my normal comfort zone. It was tough and long. But you know, having all this vocal support was really the best thing about it: people bringing us food to the trial, having time to spend with my codefendants and Rosemary, through all the conference calls and meetings.... The herbal community standing up for us was great.”

through the organization and promotion of a boycott. SCH, represented in court by Sonya del Peral and Paul C. Rapp, noted that in many of the defendants’ promotional postings and materials, they offered alternative suggestions for fire cider products, including their own, and encouraged vendors who sold SCH products to discontinue them. These actions in particular, according to the suit, caused economic harm to SCH. The legal term used in the suit, “tortious interference,” typically refers to wrongful attempts to interfere with the business relationships of a third party.

However, the counts that did not relate to the trademark (i.e., counts IV, VII, VIII, IX, and X) were dismissed on May 12, 2016, after the defendants filed a special motion to dismiss. According to United States District Judge Mark G. Mastroianni, who oversaw the proceedings, the defendants’ activities targeted by counts IV, VII, VIII, IX, and X were protected “petitioning” activity (i.e., protected under the First Amendment of the United States Constitution). Specifically, Mastroianni found that the defendants’ publishing statements, gathering signatures, speaking with retail establishments, and organizing a boycott was all for the purpose of canceling SCH’s trademark registration for “Fire Cider.” Mastroianni also noted that the counts were dismissed under a Massachusetts general law that prohibits “generally meritless” suits brought by private interests to intimidate private citizens from exercising their right to petition a governmental body. This “strategic litigation against public participation” (SLAPP) suit was, indeed, what the defendants feared would come to pass, and the dismissal was a huge relief. The case would proceed on the trademark claims and defenses alone.

Even though SCH did not originate the term “fire cider,” and never argued that it did, it contended that, despite the term’s previous use in the herbalist community, this subsection of the population was too narrow, and the term was not well known to the public at large.

Trademark law protects terms in commerce that serve as a source-identifier of goods. To gain trademark protection, a term must be distinctive; otherwise, it is considered generic. Classifications include: generic, descriptive, suggestive, arbitrary, and fanciful. As the plaintiff’s expert witness Robert Wallace stated, a generic term answers the question, “What are you?” while a trademarked term answers the question, “Where did you come from?”⁷

A brand identity expert, Wallace conducted two consumer surveys to submit as evidence for the plaintiffs: one in 2015 and one in 2017. The purpose of the surveys was to determine consumer perception and the level of public awareness of the term “fire cider.” SCH argued that because their products were available in more than 5,000 stores around the United States, including large retail chains, that the relevant consumer base consisted of the general adult population of the United States, and Wallace conducted his surveys accordingly.

In both the 2015 and 2017 surveys, Wallace concluded that awareness of fire cider was “exceptionally low” among the general population, and still low among a subset of people

who answered affirmatively to the question, “Have you ever used homeopathic or herbal remedies?” Therefore, he wrote, “Fire Cider’ is not associated with a consistent perception of what it is, further confirming that it is not a generic term.”⁷

The Defensive Strategy

The defendants worked with lawyers James Goggin and Seth Coburn of the Verrill Law Firm who offered their representation pro bono, and used two expert witnesses of their own: Ronald R. Butters, PhD, professor emeritus of English at Duke University, and Mark Blumenthal, founder and executive director of the nonprofit American Botanical Council (ABC). Butters, in addition to specializing in linguistic and legal issues related to trademarks, is also an expert in lexicography, or the creation of dictionaries. Blumenthal offered his perspective pro bono. He had previous experience in creating and marketing herbal remedies and, via the publication of more than 20 reports on the herb market in the United States in ABC’s peer-reviewed journal *HerbalGram*, has followed and reported on the herbal supplement market for decades.

Blumenthal’s decision to serve as an expert witness came after careful thought and recognition of the importance of the trial for the herbal community. “When I was contacted by the defendants’ attorney Seth Coburn, and he asked if I would act as an expert witness in this case to provide rebuttal to Mr. Wallace’s market surveys, initially, I was uncertain,” Blumenthal wrote (email, January 22, 2020). “Having been an expert witness in several previous court cases, I realized that it requires a huge time commitment. However, on further examination, I also realized that the defendants were taking an important stand for traditional herbalism and its nomenclature, and I concluded that it was in the best interests of the herbal community at large for ABC to use its resources to support the defendants and their laudable position.”

In examining the history of use of the term “fire cider” in American English, Butters found a total of 35 uses of the term, with the earliest from 1997.⁵ He described these materials as “being written by and for people who are particularly interested in herbal remedies and who have a highly specialized vocabulary.” In addition, a large number of the results referred to the term using all lowercase letters, which, according to Butters, indicated generic usage. These results came from newspapers, magazines, books, and websites selling the product; none of them indicated a particular provenance or claimed ownership of the name.

Blumenthal responded to Wallace’s surveys regarding consumer perception of fire cider.⁸ According to Blumenthal, Wallace’s results were misguided because the population surveyed was too broad and did not consider the actual market for multi-ingredient liquid herbal supplements like fire cider. (Shire City’s “Fire Cider” had been labeled and marketed initially as a dietary supplement.) In his testimony, Blumenthal referenced the current size of the herbal supplement market and critiqued Wallace’s survey for failing to address



Ingredients for making fire cider: garlic, ginger, turmeric, citrus, and other herbs.
Photo ©2020 Susan Belsinger



Two versions of fire cider: the left jar has elderberries added for their immunostimulant properties.
Photo ©2020 Susan Belsinger



Straining the marc (macerated botanicals) from the menstruum (fire cider) and bottling and adding honey to taste.
Photo ©2020 Susan Belsinger



An elderberry fire elixir (left) and traditional fire cider (right) with grated turmeric root. Practicing herbalists recommend drinking one shot per day. Photo ©2020 Susan Belsinger

“Trademark law is primarily focused on commercial use. This case presented the question of how the law should consider traditional use of a term outside of a purely commercial context. The Court’s decision reaffirms that such traditional use is not only relevant but can establish how a term is understood to the relevant public. This decision is an important precedent for future disputes involving other herbal terms with similar traditional uses.”

the most likely fire cider purchasers: core shoppers with a commitment to natural health and wellness, not the entire adult population of the United States. The size of the relevant purchasing public would become the linchpin on which Mastroianni’s decision turned.

The Trial for Fire Cider

After five years of negotiation, pre-trial documentation, and depositions, the jury-waived trial took place in Springfield, Massachusetts, over nine days, starting on March 25, 2019, and ending July 2.

“The trial was an interesting process,” said Gladstar, who attended most of the court dates and also testified for the defense. “The courthouse was built around enormous trees, the largest linden [*Tilia americana*, Malvaceae] tree I’ve ever seen as well as an herb garden. The support from the community was tremendous and felt amazing.” Local herbalists and others who were sympathetic to the defendants’ cause were present every day of the trial and provided food to the defendants and fire cider samples to visitors during the process. Gladstar continued: “To see the community standing up for traditions — fire cider was a poster child for it. They offered financial support and moral support. The defendant side at court was always full. There were picnics at the courthouse and children playing. The plaintiff side was always empty.”

Blue said: “It was intense, arduous, outside of my normal comfort zone. It was tough and long. But you know, having all this vocal support was really the best thing about it: people bringing us food to the trial, having time to spend with my codefendants and Rosemary, through all the conference calls and meetings.... The herbal community standing up for us was great.”

Telkes described the difficulty of traveling to Springfield from Austin for trial dates while maintaining her teaching schedule. “At one point I had to fly back on a Friday to teach on a Saturday and Sunday, cut Sunday’s class a little short, and fly back to federal court for Monday morning,” she wrote (email, December 26, 2019). “The judge seemed fair and though the trial itself was excruciating, I was hopeful.”

Blumenthal commented: “I was there for only one day of the trial: the day Professor Butters and I were scheduled to give our expert testimony and face questions from the plaintiff’s attorneys. Aside from various legal issues that were discussed during that day, I found it somewhat curious that the owners of Shire City did not show up in court to hear our testimony.”

The five-year process came to an end on September 30, 2019, when Mastroianni ruled that fire cider was, indeed, a generic term. In his final decision, he noted that SCH registered fire cider as a dietary supplement drink and noted, based in part on Blumenthal’s expert testimony, that “considering that genus, the relevant purchasing public is smaller than the entire adult population but larger than only herbalists and purchasers of liquid, multi-herb supplements” and that the “plaintiff’s subsequent success marketing its product ... does not alter the scope of the relevant purchasing public at the time.”⁴ He concluded that the defendants “presented evidence of generic uses of the term in the media and by competitors, consumers, and Shire City itself.” Fire cider was generic when SCH first sold it and applied for the trademark, and would remain so.

According to Coburn: “Trademark law is primarily focused on commercial use. This case presented the question of how the law should consider traditional use of a term outside of a purely commercial context. The Court’s decision reaffirms that such traditional use is not only relevant but can establish how a term is understood by the relevant public. This decision is an important precedent for future disputes involving other herbal terms with similar traditional uses” (email, January 31, 2020).

Judgment was found in favor of the defendants for counts I, II, III, V, VI, and Counterclaim I.⁵ In regard to Counterclaim II, for unfair and deceptive acts, Mastroianni found in favor of the plaintiffs. He pointed out that bringing the lawsuit was not unfair or deceptive, and that SCH was entitled to test the validity of its registered mark.

The Future of Tradition

The outcome was everything that the defendants, Gladstar, and the herbal community that supported the defendants had hoped for. Gladstar sees the value in trademarks but wanted fire cider to remain available to everybody. “No one ever told Shire City that they couldn’t sell it — we just didn’t want them to trademark something that didn’t belong to them. While it sometimes seemed like a total waste of time, energy, and money, it was also incredibly important for us to stand up for our herbal traditions.”

Telkes commented: “The trial was one part of our adventure, but there was so much more. We were sued for \$100,000 and up until the end, we were potentially liable for trademark infringement. It was extremely taxing but well worth it, in the end. We had to work in our free time to raise \$50,000 to cover trial costs outside of representation. We spent countless hours organizing and raising funds. We did this with the herbal community behind us” (email, January 31, 2020).

To Blue’s relief, her life can continue, and she no longer feels like everything is on hold. “Going through it, you’re thinking, ‘What am I doing? Am I doing the right thing?’ And yes, we did the right thing.”

The precedent set by this case holds immense meaning for any population subset with a specialized language. According to Mastroianni’s decision, the deciding factor was the prevalence of the term “fire cider” in herbalist circles prior to SCH’s trademark filing; therefore, the community of herbalists was considered relevant enough to have genericized the term. The implication going forward is that any “legacy product” within a group can be considered generic and unavailable to trademark, and Telkes called the case of fire cider the “canary in the coal mine” for traditional herbal remedies. This can impact any subset of the population: a religious group, Native American tribe, or even a crafting group can potentially use this case to argue for a term’s generic standing.

And, in the meantime, herbalists can sell

their fire cider at farmers’ markets without fear of legal action, just as Rosemary Gladstar wanted. HG

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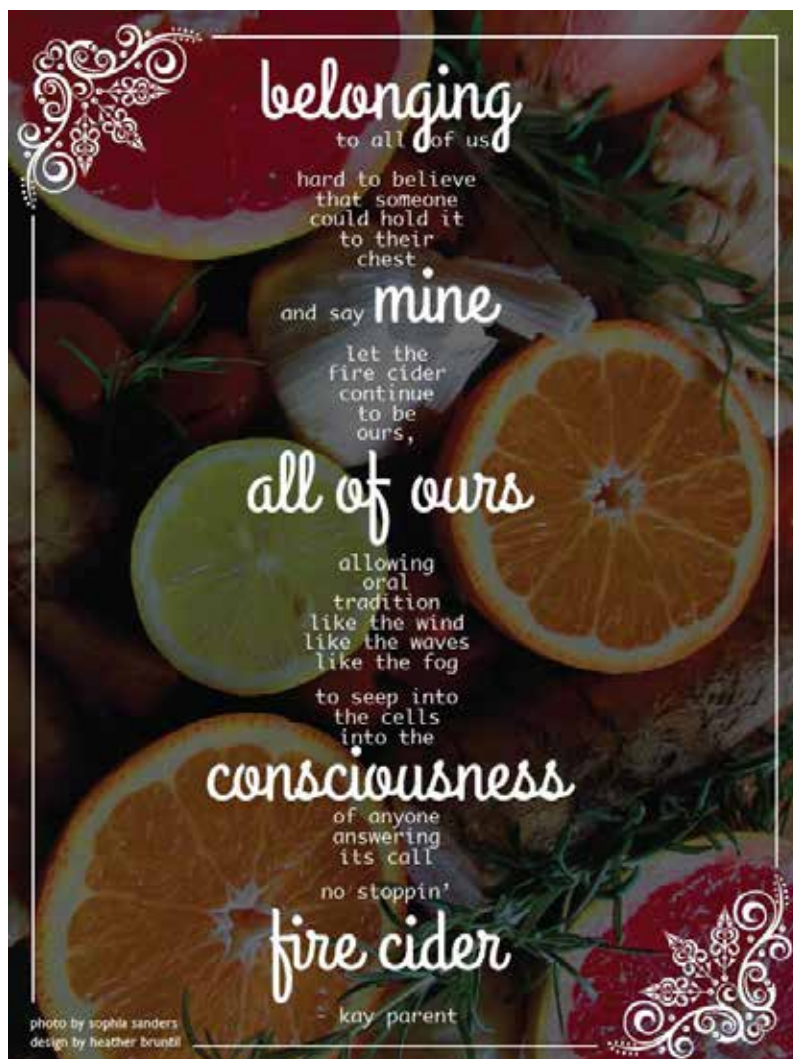


Image courtesy of Nicole Telkes