

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-cv-00183

Rabbit Hole Spirits, LLC,

Plaintiff,

v.

Old Elk Distilleries, LLC,

Defendant.

COMPLAINT

Plaintiff Rabbit Hole Spirits, LLC (“Rabbit Hole”), by and through its attorneys, hereby submits its Complaint against Defendant Old Elk Distilleries, LLC (“Old Elk”) as follows.

INTRODUCTION

This is an action for trademark infringement arising out of Old Elk’s unlawful adoption and use of trademarks and trade dress to market and sell distilled spirits to consumers. Despite Rabbit Hole’s demand that Old Elk cease using the infringing trademarks and trade dress, Old Elk has not agreed to cease using these infringing source indicators. Consequently, Rabbit Hole brings this action seeking relief under the Lanham Act, 15 U.S.C. 1051 §§ 105, *et seq.*, and supplemental Colorado state law.

PARTIES

Plaintiff Rabbit Hole is a Kentucky limited liability company with its principal place of business in Louisville, Kentucky.

Defendant Old Elk is a Colorado limited liability company with its principal place of business in Fort Collins, Colorado.

JURISDICTION AND VENUE

This action arises under the Lanham Act, 15 U.S.C. § 1501 *et seq.* This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

This Court has personal jurisdiction over Old Elk because it maintains its principal place of business in Colorado, conducts business within the State of Colorado, and because this action arises, in part, from Old Elk’s infringing activities within the State of Colorado.

Venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claims occurred within the State of Colorado.

GENERAL ALLEGATIONS

Rabbit Hole’s Launch and Use of its Rabbit Hole Trademarks

1. In 2014, Kaveh Zamanian founded Rabbit Hole Spirits and adopted the RABBIT HOLE word mark and the Jumping Rabbit Design mark (“Rabbit Hole Marks”) for use in connection with distilled spirits.

2. Continuously, since at least as early as 2015, Rabbit Hole has used the word mark RABBIT HOLE and the Jumping Rabbit Design mark shown below in connection with distilled spirits.



3. Plaintiff’s distilled spirits manufactured bearing the Rabbit Hole Marks include RABBIT HOLE® Straight Bourbon Whiskey, RABBIT HOLE® Straight Bourbon Whiskey finished in Sherry Casks, RABBIT HOLE® Straight Rye Whiskey, and RABBIT HOLE® London Dry Gin (“Rabbit Hole Products”). All of the Rabbit Hole Products are prepared in

accordance with Rabbit Hole's high standards of quality and demonstrated attention to detail expected by Plaintiff's customers.




4. Rabbit Hole and its Rabbit Hole Products have received national attention from industry publications including *Forbes* magazine, *NightClub&Bar* magazine, *HuffPost*, and *Liquor.com*. Exhibit 1. The Rabbit Hole Products have received numerous industry awards for quality, including the 2017 Double Gold Award from World Wine & Spirits for "Best Straight Bourbon," the 2017 Gold SIP Award, the 2017 Gold in connection with the San Francisco World Spirits Competition, and the 2017 Gold in connection with the New York International Spirits Competition.





5. Over the past four years, Rabbit Hole has invested millions of dollars and thousands of hours of time and effort to develop its products, create and protect its intellectual property, and develop and maintain the goodwill of its RABBIT HOLE branding. In 2017, Rabbit Hole was granted membership to the Kentucky Distillers' Association, the source of the KENTUCKY BOURBON TRAIL® and KENTUCKY BOURBON TRAIL CRAFT TOUR® attractions, which promote the history and quality of Kentucky bourbon to bourbon lovers around the world.

6. Rabbit Hole's investment in its Rabbit Hole Products and the goodwill associated therewith includes the construction of a 55,000 square foot distillery campus in downtown Louisville, Kentucky at a cost of \$15 million dollars. Once complete, the Rabbit Hole distillery will produce 20,000 barrels of distilled spirits annually and will offer an on-site restaurant and craft cocktail bar featuring the Rabbit Hole Products.

7. Rabbit Hole also uses or licenses use of the Rabbit Hole Marks in connection with bourbon-flavored products or other bourbon-related products, including use for bourbon-flavored ice cream.

8. In recognition of Rabbit Hole's exclusive right to use the Rabbit Hole Marks in connection with the Rabbit Hole Products, the United States Patent and Trademark Office has granted Rabbit Hole numerous trademark, service mark and trade dress registrations:

Trademark	Registration No.	Full Goods/Services
RABBIT HOLE	Reg. No. 4,813,586	Distilled Spirits; Liquor; Whiskey in International Class 33.
	Reg. No. 4,814,161	Distilled Spirits in International Class 33.
	Reg. No. 5,220,004	Alcoholic beverages, except beer; Bourbon; Distilled Spirits; Whiskey in International Class 33.
	Reg. No. 5,109,943	Alcoholic beverages, except beer; Distilled Spirits in International Class 33.

Trademark	Registration No.	Full Goods/Services
	Reg. No. 5,157,848	Alcoholic beverages except beers; distilled spirits in International Class 33.
<p>FOLLOW THE HARE</p>	Reg. No. 4,905,616	Distilled Spirits; Liquor; Whiskey in International Class 33.
	Reg. No. 5,342,223	<p>Glass beverageware; Snifters; Drinking glasses; Shot glasses; Snifters; Whiskey glasses in International Class 21.</p> <p>Alcoholic beverages, except beers; Bourbon; Distilled Spirits; Whiskey in International Class 33.</p>
	Reg. No. 5,331,065	Alcoholic beverages, except beers; Bourbon; Distilled Spirits; Gin; Whiskey in International Class 33.
	Reg. No. 5,337,081	Alcoholic beverages, except beers; Bourbon; Distilled Spirits; Gin; Whiskey in International Class 33.

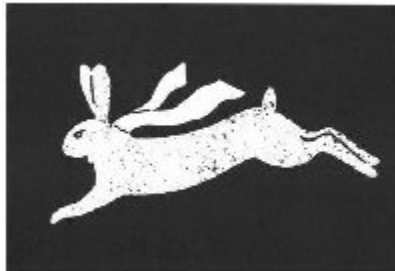
9. Copies of Rabbit Hole's Trademark Registrations identified above are filed herewith as collective Exhibit 2.

10. Rabbit Hole has promoted its Rabbit Hole Products using the Rabbit Hole Marks nationwide, including on its products, on shipping materials, on distribution vehicles, in point of sale materials, on its web site, at trade shows, and in social media. As a result of Rabbit Hole's extensive, long-standing and exclusive use of the Rabbit Hole Marks, the Rabbit Hole Marks have become strong and well-known among distilled spirits consumers and potential consumers. Plaintiff's Rabbit Hole Marks have acquired substantial goodwill and are extremely valuable commercial assets, serving to identify and distinguish the Rabbit Hole Products from other products available in the distilled spirits market.

Old Elk's Infringing Conduct

11. Defendant Old Elk operates in Colorado offering distilled spirits, primarily bourbon products.

12. In 2016, Old Elk introduced a bourbon cream product. The product, called NOOKU, incorporates trade dress bearing the jumping rabbit design mark shown below, which appears on product bottles, on product shipping boxes, on distribution vehicles and in signage.



13. The Old Elk product name NOOKU is a Native American word for the snowshoe rabbit according to Old Elk's marketing materials.

14. In addition to the jumping rabbit design mark, Old Elk uses the slogan SOFT AS A RABBIT. HARD AS BOURBON. to advertise and sell its bourbon cream product. Examples of the jumping rabbit design mark and the SOFT AS A RABBIT. HARD AS BOURBON. word mark as used in Old Elk's marketing materials are attached hereto as Exhibit 3. Taken together, Old Elk's jumping rabbit design and SOFT AS A RABBIT. HARD AS BOURBON. marks are hereafter referred to as the "Infringing Rabbit Marks."

15. Old Elk has displayed the Infringing Rabbit Design and the SOFT AS A RABBIT. HARD AS BOURBON. mark on products, on product packaging and in advertising across numerous marketing channels, including on Internet web sites and in social media.

16. As part of its marketing, Old Elk has promoted its bourbon product in connection with the Kentucky DERBY® featuring it in a recipe for the iconic Kentucky DERBY® cocktail known as the Mint Julep on Old Elk's Facebook page. Exhibit 4.

17. At no time has Old Elk sought or received permission or license from Rabbit Hole to use the Infringing Rabbit Marks.

18. Upon learning of Old Elk's unauthorized use of the Infringing Rabbit Marks to sell distilled spirits, Rabbit Hole sent written correspondence dated September 26, 2017 to counsel for Old Elk informing it of Rabbit Hole's rights and demanding that Old Elk forever cease using the Infringing Rabbit Marks. Exhibit 5. Old Elk responded by stating that its use of the Infringing Rabbit Hole Marks did not infringe Plaintiff's Rabbit Hole Marks and that it intended to continue using the disputed marks.

19. Old Elk's use of the Infringing Rabbit Marks in a prominent fashion, coupled with Old Elk's awareness of Plaintiff's well-known Rabbit Hole Marks can only be explained by an

intention to wrongfully profit from and trade off of Rabbit Hole's valuable goodwill and reputation in the Rabbit Hole Marks.

FIRST CLAIM FOR RELIEF

(Trademark Infringement in Violation of 15 U.S.C. § 1114)

20. Rabbit Hole incorporates the preceding paragraphs as though set forth fully herein.

21. Rabbit Hole owns several valid federal registrations for the Rabbit Hole Marks for, *inter alia*, distilled spirits.

22. Plaintiff's registrations for the Rabbit Hole Marks constitute *prima facie* evidence of the validity of Rabbit Hole's trademark rights and of Rabbit Hole's exclusive right to use the Rabbit Hole Marks in commerce.

23. Old Elk's unauthorized use of the Infringing Rabbit Marks as trademarks in connection with its distilled spirits products is likely to cause confusion or mistake as to the source, affiliation, connection, or association of Old Elk's distilled spirits products and Plaintiff, or as to the origin, sponsorship, or approval of Old Elk's Infringing Rabbit Design products by Plaintiff.

24. Old Elk's conduct constitutes trademark infringement in violation of § 32 of the Lanham Act, 15 U.S.C. § 1114.

25. By reason of Old Elk's acts as alleged above, Rabbit Hole has suffered and will continue to suffer monetary damages and irreparable harm to the value and goodwill of Plaintiff's Rabbit Hole Marks, as well as irreparable harm to Rabbit Hole's business, goodwill, and reputation.

26. Plaintiff has no adequate remedy at law because damage to Plaintiff's goodwill and reputation are continuing and difficult to ascertain.

27. Old Elk's continued use of the Infringing Rabbit Marks is deliberate and willful and constitutes a knowing infringement of the Rabbit Hole Marks.

SECOND CLAIM FOR RELIEF

(False Designation of Origin in Violation of 15 U.S.C. § 1125(a))

28. Rabbit Hole incorporates the preceding paragraphs as though set forth fully herein.

29. Plaintiff's Rabbit Hole Marks are inherently distinctive or have acquired distinctiveness among the relevant trade and public as identifying Plaintiff's food items and services.

30. Defendant's use of the Infringing Rabbit Marks as trademarks for its distilled spirits products is likely to cause confusion, mistake, or to deceive consumers as to the affiliation, connection, association of Old Elk's bourbon cream product and Plaintiff, or as to the origin, sponsorship, or approval of Old Elk's products by Plaintiff.

31. Old Elk's use of the Infringing Rabbit Marks in connection with its bourbon product constitutes trademark infringement, unfair competition, and false designation of origin in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

32. By reason of Old Elk's acts as alleged above, Rabbit Hole has suffered and will continue to suffer monetary damages and irreparable harm to the value and goodwill of Plaintiff's Rabbit Hole Marks, as well as irreparable harm to Rabbit Hole's business, goodwill, and reputation. Plaintiff has no adequate remedy at law because damage to Plaintiff's goodwill and reputation are continuing and difficult to ascertain.

33. Old Elk's continued use of the Infringing Rabbit Marks is deliberate and willful and constitutes a knowing infringement of Plaintiff's Rabbit Hole Marks.

THIRD CLAIM FOR RELIEF

(Trade Dress Infringement in Violation of 15 U.S.C. §§ 1114 & 1125(a)(1))

34. Rabbit Hole incorporates the preceding paragraphs as though set forth fully herein.

35. Rabbit Hole has established unique and recognizable trade dress for the Rabbit Hole Products such that the trade and general public recognize those designs and quality as originating from Rabbit Hole.

36. Rabbit Hole owns a valid federal registration for its trade dress comprised of its three-dimensional bottle design incorporating the Rabbit Hole Marks for, *inter alia*, distilled spirits.

37. Rabbit Hole's trade dress includes continued use and display of the Rabbit Hole Marks, the size, shape, color, design, and words and slogans associated with the Rabbit Hole Products, packaging, point of purchase materials, signs, displays, and vehicles.

38. These elements described above are non-functional.

39. These elements described above are inherently distinctive and have secondary meaning and have identifying significance to the Rabbit Hole Products.

40. Plaintiff's registration for its bottle design constitutes *prima facie* evidence of the validity of Rabbit Hole's trade dress rights and of Rabbit Hole's exclusive right to use said trade dress in commerce.

41. Old Elk's unauthorized use of Rabbit Hole's unique trade dress or trade dress confusingly similar thereto in connection with its distilled spirits products is likely to cause confusion or mistake as to the source, affiliation, connection, or association of Old Elk's distilled spirits products and Plaintiff, or as to the origin, sponsorship, or approval of Old Elk's Infringing Rabbit Design products by Plaintiff.

42. Old Elk's conduct constitutes trade dress infringement in violation of § 32 of the Lanham Act, 15 U.S.C. § 1114 and § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1).

43. By reason of Old Elk's acts as alleged above, Rabbit Hole has suffered and will continue to suffer monetary damages and irreparable harm to the value and goodwill of Plaintiff's Rabbit Hole Marks, as well as irreparable harm to Rabbit Hole's business, goodwill, and reputation.

44. Plaintiff has no adequate remedy at law because damage to Plaintiff's goodwill and reputation are continuing and difficult to ascertain.

45. Old Elk's continued use of the Infringing Rabbit Marks is deliberate and willful and constitutes a knowing infringement of the Rabbit Hole Marks.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Rabbit Hole requests that the Court enter Judgment in its favor as follows:

(A) Granting temporary, preliminary, and permanent injunctive relief enjoining Old Elk and each of its affiliates, subsidiaries, officers, directors, agents, servants, and employees, and all others aiding, abetting, or acting in concert therewith, from:

(i) using the Infringing Rabbit Marks, or any other mark confusingly similar thereto, in connection with the promotion of its distilled spirits;

(ii) otherwise competing unfairly or committing any acts likely to confuse the public into believing that Old Elk or any of Old Elk's products are associated, affiliated or sponsored by Rabbit Hole or are authorized by Rabbit Hole, in whole or in part, in any way;

(B) Ordering that Old Elk account for and pay to Rabbit Hole any and all profits Old Elk has received by its conduct alleged herein;

(C) Awarding to Rabbit Hole any and all damages and losses suffered by Rabbit Hole as a result of Old Elk's conduct as set forth herein, and treble such damages as provided by law;

(D) Awarding to Rabbit Hole the costs of this action and its reasonable attorneys' fee and expenses.

(E) Awarding to Rabbit Hole pre-judgment and post-judgment interest on all damages recovered by or awarded to it;

(F) Granting such other and further relief as the Court deems equitable and appropriate.

Respectfully submitted this 24th day of January, 2018.

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