



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 OCT 19 P 3: 32

HEARINGS OFFICE

BUSINESS REGISTRATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the)	TN 2009-2
)	
Trade Name)	DIRECTOR'S FINAL ORDER
)	
"FULL MOON FARM.")	
)	
)	
)	

DIRECTOR'S FINAL ORDER

On August 28, 2009, the duly appointed Hearings Officer submitted her Findings of Fact, Conclusions of Law and Recommended Order in the above-captioned matter to the parties.

On September 14, 2009, Suzanne Patterson ("Petitioner") filed written exceptions to the Hearings Officer's recommended decision. On September 28, 2009, Bruce Vogel ("Respondent") filed a statement in support of the Hearings Officer's recommended decision. Oral argument was not requested.

Upon review of the entire record of this proceeding, including Petitioner's exceptions and Respondent's statement in support, the Director modifies the Hearings Officer's Findings of Fact as follows:

5. Respondent chose to include the term "farm" in their trade name because the land they leased had macadamia nut, coffee and avocado trees. Respondent's initial focus was macadamia nuts, and from October 2005 to December 2006 Respondent sold macadamia nuts to MacFarms of Hawai'i LLC and Mauna Loa Macadamia Nut Corporation. Currently, Respondent sells Kona coffee through a website, through businesses in Hawai'i and one business on the mainland, and sells macadamia nuts and avocados wholesale.

The Director adopts the Hearings Officer's conclusions of law and finds that Petitioner has not established by a preponderance of the evidence that Respondent's trade name is substantially identical to Petitioner's registered trade name or that there is a likelihood of confusion from Respondent's use of its registered trade name "Full Moon Farm." Accordingly, the Director orders that Petitioner's petition to revoke the trade name "Full Moon Farm" be and hereby is dismissed.

DATED: Honolulu, Hawaii, October 15, 2009.



LAWRENCE M. REIFURTH

Director

Dept. of Commerce and Consumer Affairs



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 OCT -9 A 8:56

HEARINGS OFFICE

BUSINESS REGISTRATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the) TN 2009-2
)
Trade Name) ERRATA
)
"FULL MOON FARM.")
)
)
)
)
)


ERRATA

Paragraph 3 of the Findings of Fact, Conclusions of Law and Recommended Order issued in the above-captioned matter on August 28, 2009 should read as follows:

3. On April 4, 2006, the Department of Commerce and Consumer Affairs issued Certificate of Registration No. 326721 ZZ to Respondent for the trade name "Full Moon Farm". The purpose of **Respondent's** business is "Farm that produces macadamia nuts, coffee, avocados, etc." The registration expires on April 3, 2011. Copies of labels and the home page of "Full Moon Farm" are attached hereto and incorporated herein by reference as Appendix "B".

OCT - 9 2009

DATED: Honolulu, Hawaii, _____.


SHERYL LEE A. NAGATA
Administrative Hearings Officer
Dept. of Commerce
and Consumer Affairs



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 AUG 28 A 10:49

HEARINGS OFFICE

BUSINESS REGISTRATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the)	TN 2009-2
)	
Trade Name)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF
"FULL MOON FARM.")	LAW AND RECOMMENDED
)	ORDER; APPENDICES "A" AND
)	"B"
)	

HEARINGS OFFICER'S FINDINGS OF FACT
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

On February 6, 2009 Suzanne Patterson ("Petitioner") filed a petition requesting that the certificate of registration for the trade name "Full Moon Farm," issued by the Department of Commerce and Consumer Affairs to Bruce Vogel ("Respondent") be revoked. The Notice of Hearing and Pre-Hearing Conference was transmitted to the parties.

On April 30, 2009, a hearing was conducted by the undersigned Hearings Officer. Petitioner and Respondent appeared *pro se*. Anna Vogel was also present on behalf of Respondent.

Having reviewed and considered the evidence and argument presented at the hearing, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT

1. On December 9, 2003, the Department of Commerce and Consumer Affairs issued Certificate of Registration No. 310295 ZZ to Petitioner for the trade name "Full Moon Coffee". The purpose of Petitioner's business is "Kona Coffee Sales". The registration

expires on December 8, 2013. Copies of labels and the home page of “Full Moon Coffee” are attached hereto and incorporated herein by reference as Appendix “A”.

2. Since 2003, Petitioner has sold Kona coffee through a website and through outlets in Kona.

3. On April 4, 2006, the Department of Commerce and Consumer Affairs issued Certificate of Registration No. 326721 ZZ to Respondent for the trade name “Full Moon Farm”. The purpose of Petitioner’s business is “Farm that produces macadamia nuts, coffee, avocados, etc.” The registration expires on April 3, 2011. Copies of labels and the home page of “Full Moon Farm” are attached hereto and incorporated herein by reference as Appendix “B”.

4. Respondent was not aware of Petitioner’s trade name “Full Moon Coffee” when he registered “Full Moon Farm”. However, he did become aware of “Full Moon Coffee” in the latter part of 2006. Although surprised and dismayed, Respondent accepted it and continued establishing the business as he was already registered as “Full Moon Farm” and had encountered no apparent conflicts. Respondent also felt that there would be enough differences in the label, website, addresses and customer base to set them apart.

5. Respondent sells Kona coffee through a website, through businesses in Hawai’i and one business on the mainland.

6. Both farms are located on Mamalahoa Highway in Kona and both Petitioner and Respondent are members of the Kona Coffee Council.

7. Petitioner and Respondent have used the same printer in Kona and this printer was the first to alert Petitioner to “Full Moon Farm”. Petitioner’s webmaster also notified Petitioner of Respondent’s website.

8. The Kona Coffee Council inadvertently deleted “Full Moon Coffee” from their listing when “Full Moon Farm” joined the Kona Coffee Council. This has since been corrected.

9. Petitioner has had instances where “clients call saying that they see we are on e-bay but that the label looks different.”

10. At the hearing, Respondent stated that he will be selling his coffee under the trade name “Jump the Moon” coffee, but will retain the trade name “Full Moon Farm” for the rest of his business.

III. CONCLUSIONS OF LAW

Petitioner seeks revocation of the trade name “Full Moon Farm” on the basis of prior ownership. In order to prevail, Petitioner must prove by a preponderance of the evidence that “Full Moon Farm” is substantially identical to “Full Moon Coffee” or that there is a likelihood of confusion among consumers as a result of Respondent’s use of “Full Moon Farm.”

Hawai’i Administrative Rules § 16-36-15 provides:

§ 16-36-15 Registration of trademarks, service marks, prints, and labels; corporation names, partnership names, limited liability company names, and trade names. (a) A proposed name or mark that is substantially identical to a registered name or mark shall be rejected and not accepted for registration.

...

(b) A name or mark is not ‘substantially identical’ if:

(1) A comparison of the name or mark reveals a difference from the names on file with the division, unless the name is likely to be confused upon oral communication. For example, ‘Ice Cream Shop, Inc.’ and ‘Ice Cream Sweet Shop, Inc.’[.]

Upon review of the standards for the registration of trade names and trademarks, the Hearings Officer concludes that “Full Moon Coffee” and “Full Moon Farm” are not substantially identical.

Hawai’i Revised Statutes § 482-8 provides:

§ 482-8 Revocation of trade name registration. (a) Any person claiming to be the owner of a trade name or mark whose common law rights are infringed upon, or any entity registered or authorized to transact business under the laws of this State whose common law right to its entity name are infringed upon, by a trade name for which a certificate of registration pursuant to this chapter has been issued to any other person may file a petition in the office of the director for the revocation of the registration of that trade name. The petition shall set forth the facts and authority supporting the claim that the petitioner has common law rights of ownership

of the trade name...that these rights are being infringed upon by the other registered trade name that is confusingly similar to the petitioner's trade name...and that the certificate of registration should be revoked[.]

The test for determining whether “Full Moon Coffee” and “Full Moon Farm” are confusingly similar is “whether there is a likelihood of confusion in the mind of a reasonably prudent buyer.” *In re Kona's Something Special*, TN 84-4 (Director's Final Order August 8, 1984). “A likelihood of confusion exists when consumers would be likely to assume that the source of the products or services is the same as or associated with the source of a different product or service identified by a similar mark.” *Carrington v. Sears Roebuck & Company*, 5 Haw. App. 194, 683 P.2d 1220 (1984).

In *In re Kona's Something Special*, *supra*, the Director adopted standards for determining the likelihood of confusion, modifying the eight factors set forth in the *Carrington* case to six factors which are: 1) similarity of the names, 2) similarity of businesses, 3) channels of trade, 4) evidence of actual confusion, 5) respondent's intent in adopting the name, and 6) strength of the name.

Applying the foregoing criteria, the Hearings Officer finds that the businesses and channels of trade for the two names at issue are similar. However, those findings do not compel revocation of Respondent's trade name as all six factors set forth in *In Re Kona's Something Special* must be considered. While both names use “Full Moon”, the coffee's packaging and the websites developed by Petitioner and Respondent are very different in appearance (see Appendices “A” and “B”). Petitioner presented some evidence regarding actual confusion, but most of the evidence concerned Petitioner's concern over potential confusion. The fact that the printer and webmaster alerted Petitioner to Respondent's name shows that they were not confused and knew the difference between the two entities. The confusion by the Kona Coffee Council was not consumer confusion, which is required in order to prove a likelihood of confusion. The Hearings Officer finds that the evidence presented was insufficient to demonstrate actual confusion in the marketplace as it was very limited in scope--of a *de minimus* nature. See, “*Natural Hawaiian*” and “*Natural Hawaiian Clothing Company*”, TN 2003-12 (Deputy Director's Final Order April 1, 2005). As the

evidence presented did not establish that Respondent adopted the trademark with the intent to cause confusion, deceive the public or capitalize on Petitioner's reputation and goodwill, the Hearings Officer finds that Respondent did not act with wrongful intent by registering the trade name "Full Moon Farm."


The strength of the name determines the level of protection that will be provided to the name. The Hearings Officer finds that "Full Moon Coffee" is a suggestive mark, one which "subtly connote(s) something about the products with which they are associated." *Carrington, supra*, at 204. As such, it is a comparatively weak mark, but unlike merely descriptive marks, will be protected without proof of secondary meaning.

Based on the review of the evidence, the Hearings Officer concludes that Petitioner failed to prove by a preponderance of the evidence that "Full Moon Coffee" and "Full Moon Farm" is confusingly similar as the evidence presented was not sufficient to show that there is a likelihood of confusion between "Full Moon Farm" and "Full Moon Coffee."¹

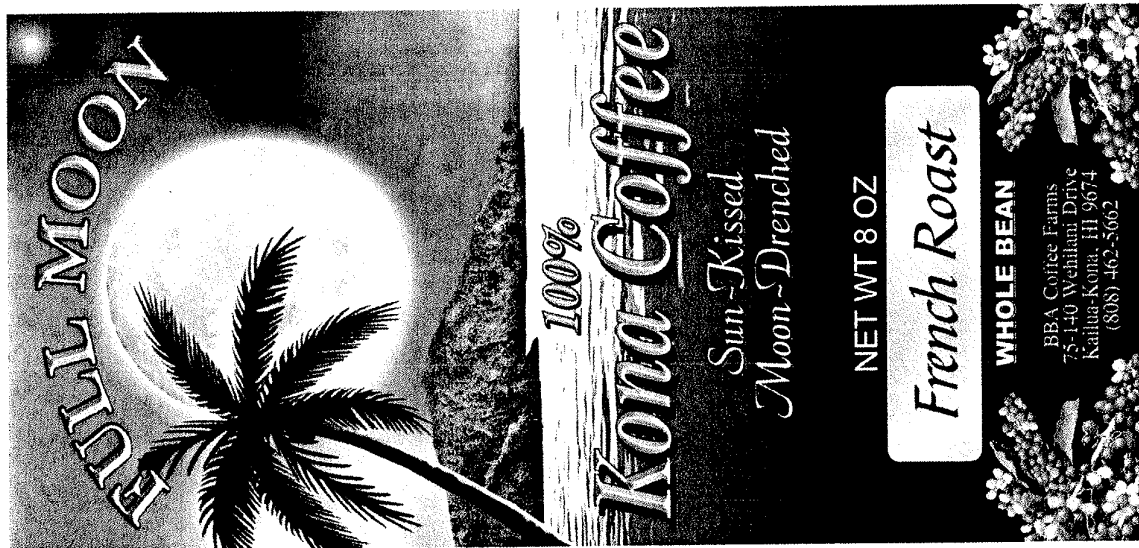
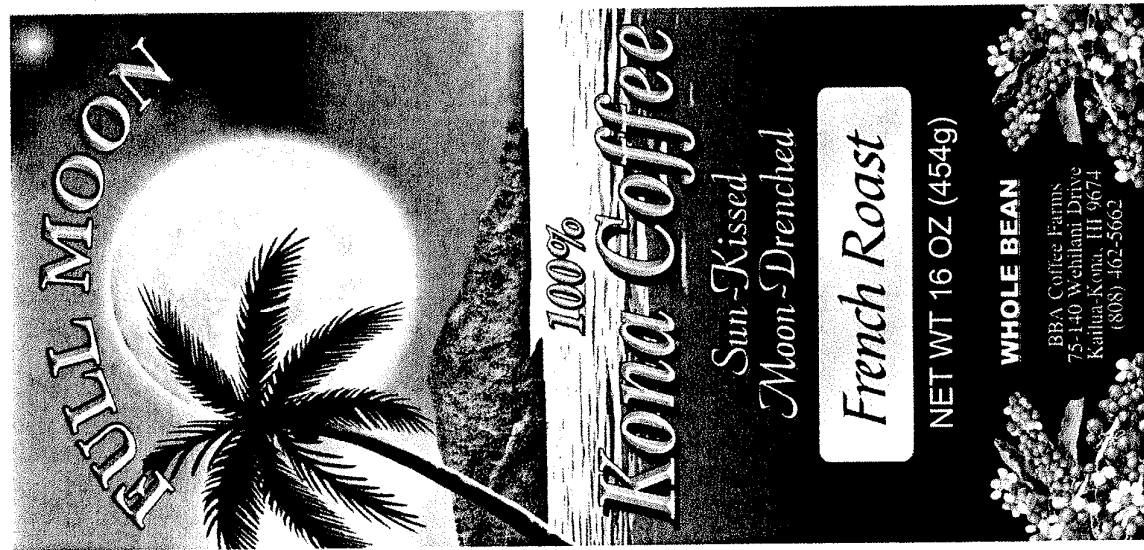
IV. RECOMMENDED ORDER

For the reasons set forth above, the Hearings Officer recommends that the Director find that Petitioner has not established by a preponderance of the evidence that Respondent's trade name is substantially identical to Petitioner's registered trade name or that there is a likelihood of confusion from Respondent's use of its registered trade name "Full Moon Farm." Accordingly, the Hearings Officer recommends that Petitioner's petition to revoke the trade name "Full Moon Farm" be dismissed.

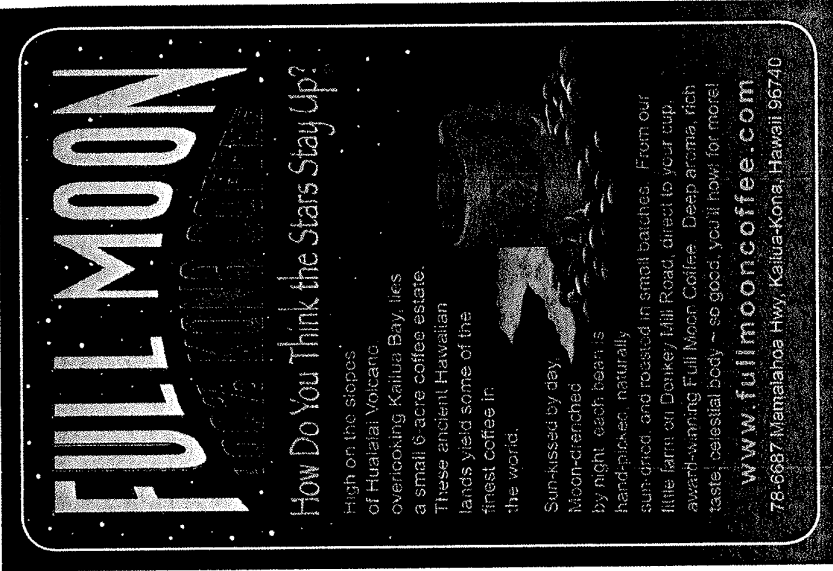
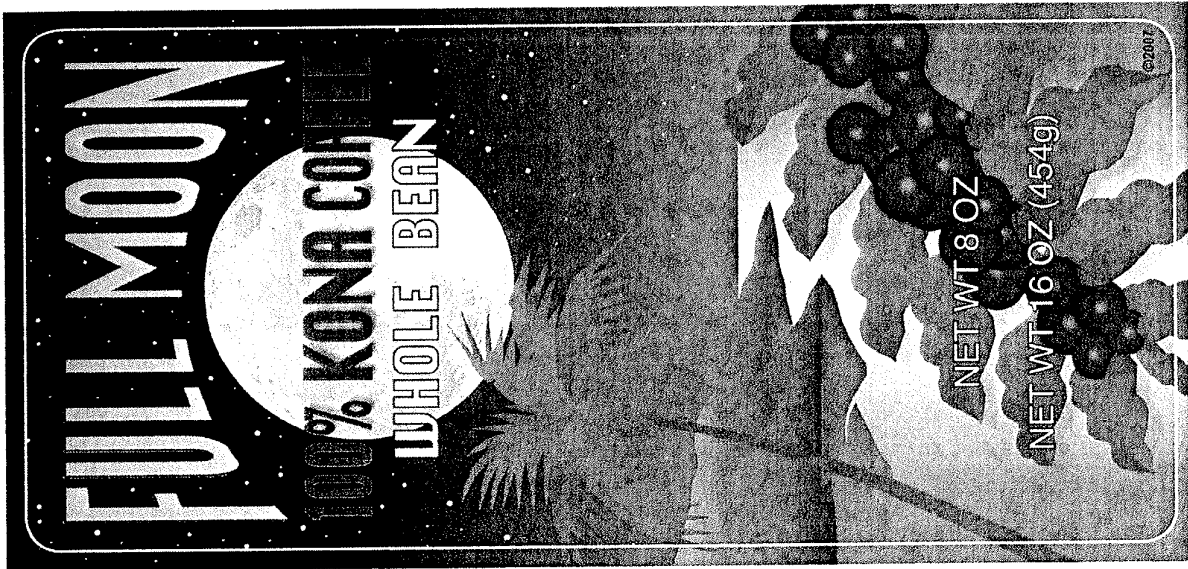
DATED: Honolulu, Hawaii, August 28, 2009.


SHERYL LEE A. NAGATA
Administrative Hearings Officer
Dept. of Commerce
and Consumer Affairs

¹ Respondent is changing the name of his coffee to "Jump the Moon" coffee in order to lessen the likelihood of confusion. Petitioner may institute another action if she encounters consumer confusion beyond "secretarial carelessness" or "inattention and indifference" or "mere carelessness" by consumers. *See*, "*Natural Hawaiian*" and "*Natural Hawaiian Clothing Company*", *Id.*

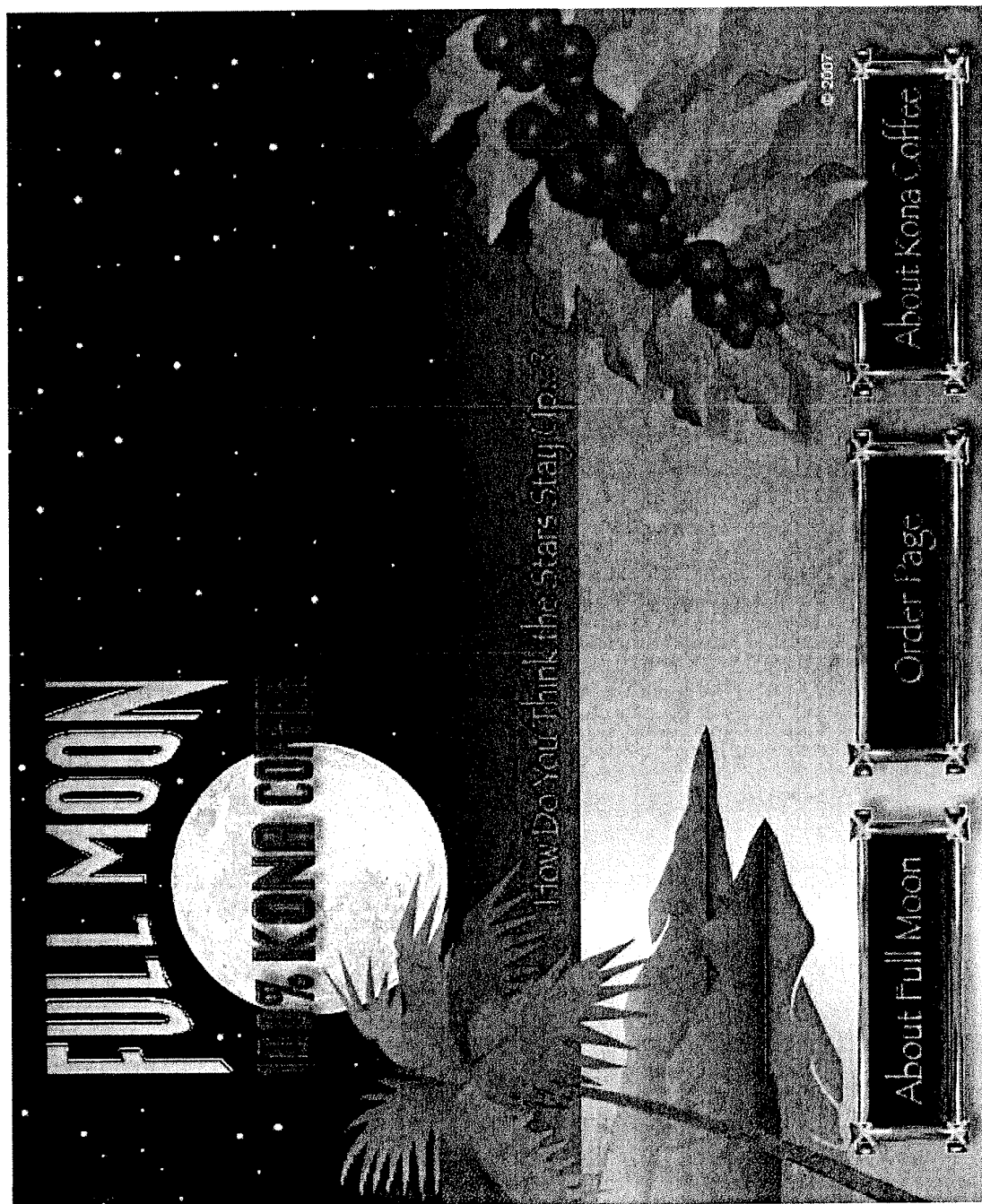


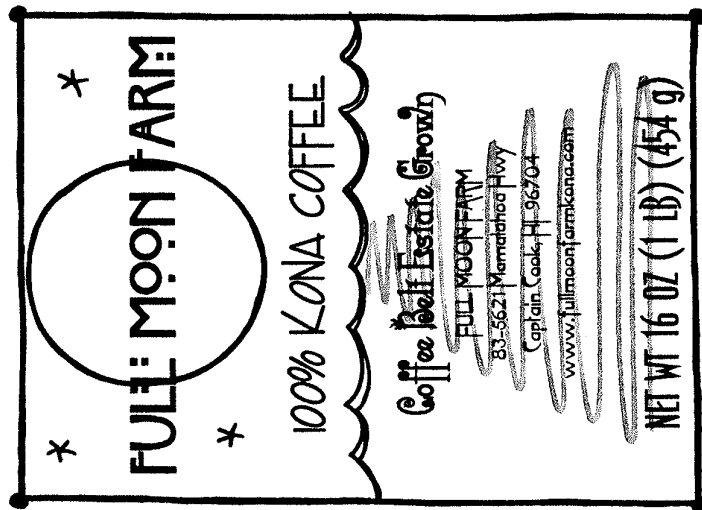
APPENDIX "A"



**NEW COFFEE LABEL
DESIGNED TO MATCH
NEW WEBSITE - 2009**

FULL MOON COFFEE WEBSITE

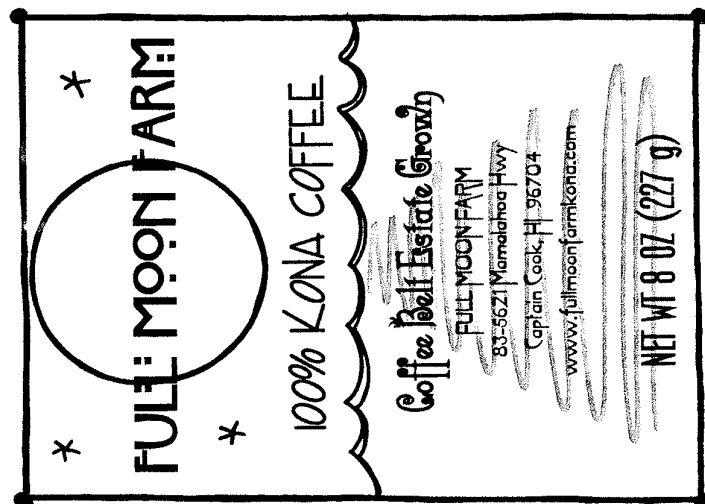




**MEDIUM DARK
ROAST**

APPENDIX "B"

**MEDIUM
ROAST**



* FULL MOON FARM *

Welcome, Gourmet Coffee Aficionados!
Enter and enjoy!



Home

About our Coffee

How to Order

Farm Photos

Contact Us



100% Kona Belt Estate Coffee

Welcome to Full Moon Farm, our family coffee farm nestled at 1,300 feet on the western slope of Mauna Loa in South Kona overlooking beautiful Kealahou Bay.

Our hand picked, hand processed coffee is rainwater rinsed, sun dried, fresh roasted, and pesticide free. We store it in a climate and moisture controlled environment to assure optimum freshness and flavor and roasted fresh upon your request.

The Kona Coffee Belt provides the perfect growing conditions for the finest, gourmet coffee:
Morning Sun, Afternoon Rains, and rich Volcanic Soil.

We invite you to try our coffee and experience the rich, smooth, aromatic flavor of fine 100% Kona Coffee, fresh from our farm to your cup.

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