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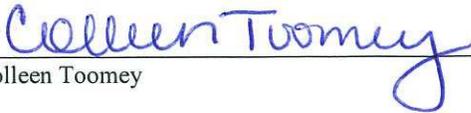
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86098613
Applicant	Early Morning LLC
Applied for Mark	LIVIN' EASY
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Date	06/11/2015

TRADEMARK

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

*I hereby certify that this correspondence is being electronically filed with the United States Patent and Trademark Office on June 11, 2015 at or before 11:59 p.m. Pacific Time under the Rules of 37 CFR § 1.8.*

  
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Colleen Toomey

Mark : LIVIN' EASY  
Serial No. : 86/098,613  
Filed : October 22, 2013  
Applicant : Early Morning LLC dba Weeks Roses  
  
Law Office : 102  
Examiner : Cimmerian Coleman  
Docket No. : 73780/W225

**APPEAL BRIEF  
TO THE TRADEMARK TRIAL AND APPEAL BOARD**

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## **I. Introduction**

For over fifteen (15) years, Early Morning LLC d/b/a Weeks Roses ("Weeks" or "Applicant") has been marketing one of its roses under the trademark LIVIN' EASY. Applicant, a longtime leader in the horticultural industry, developed and patented this new rose varietal over twenty years ago, and long ago assigned this proprietary plant the cultivar/variatal name: HARwelcome<sup>1</sup>.

This matter is up on appeal because the Trademark Examiner has incorrectly alleged the LIVIN' EASY trademark is the cultivar/variatal name of Applicant's rose, when it is not, despite wide recognition within the horticultural industry that HARwelcome is the cultivar/variatal name of this plant.

After building up a great deal of good will in the LIVIN'EASY mark for more than fifteen years, Applicant recently applied for this trademark seeking registration on the principal register. Much to its surprise, the Trademark Examiner refused registration, basing his entire rationale on an Internet search that managed to locate a few erroneous uses of the LIVIN' EASY trademark as a cultivar name. One such use was located on a website dedicated to home gardening, and another use appeared in a single scientific paper, written over eight years ago and originally published in a German journal written by Canadian and New Zealand scientists that was reproduced on several academic websites. Both erroneous uses of the mark were quickly corrected.

Moreover, in support of its registration effort, Applicant has submitted five declarations from prominent members of the horticultural industry, reflecting a broad spectrum, of potential

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<sup>1</sup> A cultivar/variatal name is a specific name that is given to a plant with characteristics that have arisen in cultivation. Cultivar/variatal names are treated as generic by the United States Patent and Trademark Office ("USPTO") and are not eligible for trademark protection.

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clients, from academia to retailers. Taken together, the Declarants clearly demonstrate that the horticulture industry knows that the cultivar name of Applicant's rose is HARwelcome, and that Applicant's trademark is LIVIN' EASY, all while demonstrating a clear understanding of the fundamental differences between a trademark and a cultivar/variety name.

However, despite the implementation of demonstrated successful corrections made to detected Internet websites, declarations from leading members in the horticultural community confirming awareness and recognition of LIVIN' EASY as a trademark for a rose associated with Applicant, and assurances from the authors of the one and only detected published academic paper that LIVIN' EASY will never be used again as a cultivar name, the Trademark Examiner continues to refuse registration. Accordingly, Applicant brings this appeal.



**The LIVIN' EASY™ Rose**

Serial No. 86/098,613

## II. Background and Procedural History

Applicant filed United States Trademark Application Serial No. 86/098613 on October 22, 2013 for its LIVIN' EASY trademark for "live plants" in International Class 031. An Office action was issued on April 17, 2014 refusing registration based on an allegation that LIVIN' EASY was a cultivar and/or a varietal name for a specific rose and, therefore, could not function as a trademark (i.e., among other issues). A response to this refusal was filed with the USPTO on May 29, 2014. A final refusal to register was issued on June 22, 2014.

On December 22, 2014 an appeal was filed with the TTAB concurrently with a request for reconsideration. That same day, the appeal was acknowledged and the case was remanded to the Trademark Examiner.

The request for reconsideration included five declarations from individuals, each occupying a unique and important niche in the rose industry, and all keenly aware of the interplay between a trademark used by a rose grower to market its flowers and the cultivar/variety/generic name each rose is assigned. Each of these individuals (i.e., [1] a University professor; [2] a plant buyer for a large garden center retailer; [3] a curator at a prestigious rose test garden; [4] a director of ornamental research and development for a large rose research facility; and [5] the Research Director and Licensing Manager for the Applicant) carefully explained their awareness and knowledge of Applicant's long term marketing efforts promoting, selling and distributing a rose in association with the trademark LIVIN' EASY, and that the well-established cultivar name assigned to this same rose is "HARwelcome."

On February 3, 2015 the request for reconsideration was denied. Appeal proceedings resumed on February 12, 2015. Subsequently, Applicant filed a request for remand on February

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24, 2015 to add new evidence to the case record that was not available in the prior prosecution. This evidence consisted of email confirmations from the authors of the one and only published reference the Trademark Examiner cited to argue that LIVIN' EASY was a generic cultivar name. In those emails, the authors confirmed their erroneous use of LIVIN' EASY, apologized for this erroneous use, agreed to immediately stop all use of LIVIN' EASY mark as a cultivar name, and only use it as a trademark in the future. Additional evidence submitted was confirmation from the operator of the one United States Internet website the Trademark Examiner had located, confirming that its erroneous use of LIVIN' EASY had also been corrected. The next day, jurisdiction was restored and the case was remanded to the Trademark Examiner. On April 8, 2015 the Trademark Examiner once again rejected the application citing the same exact one and only published article that Applicant's new evidence refuted. Proceedings before the TTAB resumed on April 13, 2015.

**III. All Facets of the Horticulture Industry Know That LIVIN' EASY is a Trademark and Not the Cultivar or Varietal Name For A Specific Rose**

Applicant has used LIVIN' EASY as a trademark since 1995. (Exhibit 1; Declaration of Christian Bedard in support of "LIVIN' EASY" trademark application, ¶9)<sup>2</sup> HARweclome is, and always has been, the cultivar name for this rose as demonstrated by United States Plant Patent No. Plant 9,161 (the "'161 Patent"). (Exhibit 6, '161 Patent at Background of the Invention).

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<sup>2</sup> All Exhibits attached to the Appeal Brief are documentary evidence of record in this case, and have been attached hereto for convenient reference.

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This knowledge and awareness has permeated every facet of the horticulture industry. From shop owners to researchers, curators to professors, they all understand that LIVIN' EASY is the trademark used to market the rose bearing HARwelcome as its varietal/cultivar name. This alone more than refutes the Trademark Examiner's two relevant erroneous examples. Applicant submits the following five declarations which demonstrate the industry's true knowledge:

1. Christian Bedard: Research Director and Licensing Manager for Applicant. (Exhibit 1)
2. David H. Byrne: Professor and Basye Endowed Chair in Rose Genetics in the Department of Horticultural at Texas A&M University, College Station, Texas 77843-2133, engaged in the research of rose breeding and genetics, among other types of research. (Exhibit 2)
3. Keith Zary: Director of Ornamental Research and Development at Gardens Alive, Inc. located at 110 West Elm Street, Tipp City, Ohio 45371, a facility engaged in research activities related to breeding, trialing and protecting ornamental plants. (Exhibit 3)
4. Bent Petersen: Green Goods Buyer for Armstrong Garden Centers, with offices at 2200 E. Route 66, Suite 200, Glendora, California 91740, a high volume distributor of live plants. (Exhibit 4)
5. Harry Landers: Curator (and Botanic Specialist II) at the Portland International Rose Test Garden, located at 400 S.W. Kingston Avenue, Portland, Oregon 97205, a facility serving as a testing ground for new rose varieties. (Exhibit 5)

Each of the above declarants stated in one form or another, the following:

As part of my duties at [my company], I routinely and regularly encounter products and brands used by Weeks Roses. In this regard, I am intimately aware

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of Weeks Roses and its use of the LIVIN' EASY trademark with respect to one of its rose product offerings. I have been aware of Weeks Roses LIVIN' EASY trademark being used for roses for over 15 years and I readily identify Weeks Roses as the source associated with the LIVIN' EASY trademark for one line of its rose products. To the best of my knowledge, Applicant Weeks Roses is the only company using the LIVIN' EASY trademark for roses.

Furthermore, the cultivar name for the generic rose varietal that Applicant Weeks Roses sells under its LIVIN' EASY trademark is "HARwelcome." It is my understanding that the United States Patent and Trademark Office ("USPTO") has formed an erroneous belief that the cultivar name for this plant product is LIVIN' EASY. I am offering this Declaration in an effort to inform the USPTO of the erroneous conclusion it has made. LIVIN' EASY is the trademark. "HARwelcome" is the cultivar name.

Based on my experience in the live plant field, it is my understanding Applicant Weeks Roses is well-known in the industry and persons in the industry associate the LIVIN' EASY trademark with Applicant Weeks Roses with respect to roses, and that persons in the industry are aware that cultivar name for this generic living plant is "HARwelcome."

(Exhibits 1, 2, 3, 4, 5)

These statements demonstrate that the horticultural industry along with the public is aware that the rose claimed by the '161 Patent bears the "HARwelcome" cultivar/variatal name and is marketed to the public under the LIVIN' EASY trademark. Applicant's use of the LIVIN'

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EASY mark has been continuous for the last 15 years, and its designation of “HARwelcome” as the cultivar/variety name has been known since the issuance of the '161 Patent. These are two distinct types of identification and are appropriately recognized in their respective roles.

**IV. Two Examples of an Erroneous Use Do Not Convert a Legitimate Trademark into a Cultivar/Varietal Name**

The only basis for the Trademark Examiner’s rejection is the incorrect allegation that LIVIN’ EASY is the cultivar name for a specific breed of roses. (Exhibit 7, First Office Action) Cultivar names are considered to be “generic” and are not registerable as trademarks. *In re KRB Seed Co. LLC.*, 76 U.S.P.Q.2d 1156 (2005); TEMP § 1202.12; 2 McCarthy on Trademarks and Unfair Competition § 12:36 (4th ed.) (“The varietal name for a plant may be a generic name not protectable as a trademark for the plant.”) In support for its rejection, the Trademark Examiner cited only two references. The first was an abstract from a paper that was originally published in a German journal<sup>3</sup> written by a team of Canadian and New Zealand scientists, Estabrooks, Brown and Dong titled “2,4,5-Trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar ‘Livin’ Easy” (Rosa s.p.) (*Id.*) In support of the refusal, the Trademark Examiner has cited several instances of this same article reproduced across multiple academic webpages.

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<sup>3</sup> The article was published in the February 2007 edition of Plant Cell Reports. <http://www.ncbi.nlm.nih.gov/pubmed/16972095> Plant Cell Reports is a English publication by a German publication Springer. <http://link.springer.com/journal/299>. (enclosure to Exhibit 7) Weeks notes that to the extent the Estabrooks article is relevant, Weeks had been using LIVIN’ EASY as a trademark for more than a decade before the article was published.

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In the final office action, the Trademark Examiner added an additional citation to BackYardGardener.com, which also characterized LIVIN' EASY as a cultivar name. (Attachments 1-13 to Exhibit 8) As discussed in greater detail below, Applicant contacted the owner/operator of this Internet website and the erroneous use was immediately terminated with the full cooperation of the Internet website owner.

As indicated above, in response to the final office action, Applicant filed a request for reconsideration. When denying this request for reconsideration, the Trademark Examiner once again cited additional instances of the same identical Estabrooks article, this time across new academic webpages. (Exhibit 9)

**a. The Trademark Examiner's Cited References Do Not Demonstrate that LIVIN' EASY is The Cultivar or Varietal Name for a Specific Rose.**

The Trademark Examiner's citations are limited to two erroneous examples of third party use. However, two isolated instances of erroneous use does not convert Applicant's LIVIN' EASY trademark into a cultivar/variatal name for a rose. TEMP § 1202.12. Moreover, these two erroneous uses have been corrected by the former erroneous users.

**i. The Estabrooks Article is Targeted to the Wrong Audience, by Authors From the Wrong Country, and Was Corrected.**

The Estabrooks paper, titled "2,4,5-Trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar 'Livin' Easy'" was written by a joint team of Canadian and New Zealand researchers and published in a German journal. The fact that this article was written by foreign scientists in a German publication with no clear ties to an American research institution alone is grounds to disregard this article as evidence of use of LIVIN' EASY as a

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cultivar name. *Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 642 (8th Cir. 1984) (“a term may be generic in one country and suggestive in another.”)

Even if the Estabrook article was relevant to the understanding of LIVIN’ EASY by the scientific community in the United States, a single erroneous reference to a cultivar name published in a scientific article that was itself only re-published on scientific websites does not demonstrate that LIVIN’ EASY, and not HARWelcome, is the cultivar name in the eyes of the relevant *public*. In order for a trademark to become the generic name for a good—in this case a plant cultivar or varietal name—“the primary significance of the [LIVIN’ EASY] mark to the relevant *public* is the [rose] itself, rather than a [rose] provided by a particular entity.” *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 641-42 (Fed. Cir. 1991) (emphasis added). A reference to LIVIN’ EASY in a scientific paper hardly demonstrates that the primary significance of the mark to the relevant *public* is the rose itself rather than the rose provided by a particular entity.<sup>4</sup> There is no evidence whatsoever that the *public* would interested in reading an article titled “2,4,5-Trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar.” This is clearly an article targeted at the scientific community, not the ordinary rose purchaser.

Genericness is evaluated from the view of the relevant purchasing *public*. A mistake in the cultivar name promulgated across multiple academic websites by a single erroneous scientific paper written by foreign scientists and originally published in a foreign journal does not demonstrate what the meaning of the LIVIN’ EASY mark is in the mind of the relevant *American public*.

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<sup>4</sup> The detected single publication does not even demonstrate what the primary significance of the mark is to the *scientific* community.

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Further weakening the Trademark Examiner's refusal is the fact that the mistake in the Estabrooks article has been fixed. Part of the new evidence that Applicant submitted on February 24, 2015 was a series of emails from the authors of the Estabrooks article. In the first email, the author, Professor Zhongmin Dong stated that he had stopped using the LIVIN' EASY trademark when referring to the rose cultivar in the future. (Exhibit 10) Professor Dong did not dispute that LIVIN' EASY was a trademark and appears to concur that LIVIN' EASY is not a cultivar name. In a second email, another of the authors of the paper, Robin Browne, also stated that she was unaware of the mistake in the utilization of the varietal name and confirmed compliance with Applicant's request to stop using the LIVIN' EASY trademark when referring to the rose cultivar in the future. (Exhibit 11) Ms. Browne did not dispute that LIVIN' EASY was a trademark and not a cultivar name. Estabrooks, the third named author of the article, could not be reached or located.

This policing and correction of the cited irrelevant erroneous use demonstrates that LIVIN' EASY is not associated with the cultivar/varietal name. The fact that no subsequently published articles have referred to LIVIN' EASY as a cultivar/varietal name is further evidence that LIVIN' EASY is not a cultivar/varietal name.

**ii. The BackYardGardner Article Was Corrected.**

The only other example of LIVIN' EASY's erroneous use as a cultivar/varietal name instead of a trademark that was cited by the Trademark Examiner, and the only one really relevant to show use in the minds of the consuming public, was on BackYardGardner.com. Yet this use too was corrected. Surely if the LIVIN' EASY mark had become the generic cultivar or

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varietal name, the examiner would be able to find more than a single citation in the relevant demographic.

Proof of the correction can be found in Exhibits 12 and 13 attached to this brief. Part of the new evidence that Applicant submitted on February 24, 2015 was an email from Duncan McAlpine, one of the administrators of BackYardGardner.com stating that he had removed the reference to LIVIN' EASY. (Exhibit 12) As with Professor Dong, Mr. McAlpine did not contest that LIVIN' EASY was in fact a trademark and not a cultivar name. He willingly changed the website, and the entry no longer makes reference to LIVIN' EASY as a cultivar/varietal name. (Exhibit 13)

This policing and correction of the cited relevant erroneous use demonstrates that LIVIN' EASY is not associated with the cultivar/varietal name.

\* \* \*

The only two references cited by the Trademark Examiner that allegedly demonstrate that LIVIN' EASY is the cultivar name have now been corrected. In neither instance did the authors of either reference contest that LIVIN' EASY functions as a trademark and nor did the authors suggest that LIVIN' EASY was a cultivar/varietal name for the specific rose in question.

All of the remaining citations by the Trademark Examiner, his initial rejection, final rejection and rejection upon reconsideration were simply iterations of the exact same Estabrooks published paper that was reproduced on various academic websites. Because applicant has addressed these erroneous entries, secured corrections to such erroneous use, and the Trademark Examiner cites no other examples of LIVIN' EASY as a cultivar name, the Trademark Examiner's refusal should be withdrawn.

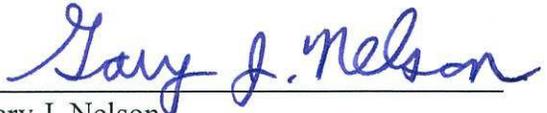
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V. Summary

In light of the evidence and arguments presented, Applicant requests that the refusal be withdrawn.

Respectfully submitted,

CHRISTIE, PARKER & HALE, LLP

By 

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GJN/ct  
Attachments (Exhibits 1-13)

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# **EXHIBIT 1**

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Mark : LIVIN' EASY  
Serial No. : 86098613  
Filed : October 22, 2013  
Applicant : Early Morning LLC dba Weeks Roses  
  
Law Office : 102  
Examiner : Cimmerian Coleman  
  
Docket No. : 73780/W255

Declaration of Christian Bedard in support of "LIVIN' EASY" trademark application

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Post Office Box 29001  
Glendale, CA 91209-9001

Commissioner:

I, Christian Bedard, hereby declare as follows:

1. I am the Research Director and Licensing Manager for Applicant Early Morning LLC dba Weeks Roses ("Weeks Roses").
2. I have a B.S. in Biology and a Master's Degree in Biological Sciences (Plant Genetics) from the University of Montreal, and am proficient in English, French and Spanish. During my graduate studies at the University of Montreal, I worked on the protocol for the utilization of gamma rays to induce mutation in rose seeds, rose *in vitro* plants and rose plants. I also specialized in *in vitro* culture of rose plants and rose embryos from which I worked on acclimatization and *in vivo* rooting methods for rose plantlets. I also explored the molecular characteristics of the rose world using the technique of Random Amplified Polymorphic DNA (RAPD) to fingerprint rose plants, select genes and analyze the phylogenetic origin of the plants.
3. During my professional career, I have gained extensive experience in the improvement of winter hardy roses and have established myself as a knowledgeable speaker on

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rose care and culture. I have written numerous technical and promotional informational literature in support of patenting new rose cultivars, including "William Booth," Marie-Victorin" and "De Montarville" from the Canadian Explorer rose collection. I have been interviewed on many radio and television shows on the care and cultivation of roses.

4. I began my career at Weeks Roses in 2000 as the Licensing Project Manager and Research Assistant. As indicated above, I am currently the Research Director and Licensing Manager for Weeks Roses.

5. Under my direction, at Weeks Roses, each year about 40,000 - 45,000 flowers are hand-pollinated in the research facility maintained by Weeks Roses in Pomona, California in order to produce around 250,000 seeds. Private trials are conducted in Tennessee, Washington, New York, Ohio and California where the seedlings are thoroughly tested. Based on my observations of the test results, I make methodical and careful selections to ensure Weeks Roses only sells and distributes roses worthy of the Weeks Roses name.

6. The roses and plants I have cultivated have been recognized by the industry. For example, I have produced three Award of Excellence winners sold under the following trademarks: Harm Saville<sup>™</sup> (2005); Spirit Dance<sup>™</sup> (2010) and Be My Baby<sup>™</sup> (2011). My hybrid creations include roses branded as Coffee Bean<sup>™</sup> (2008); Teeny Bopper<sup>™</sup> (2009); Cape Diamond<sup>™</sup> (2009); Pumpkin Patch<sup>™</sup> (2010); White Licorice<sup>™</sup> (2011); Smoke Rings<sup>™</sup> (2011) and Party Hardy<sup>™</sup> (2011). I have also been the co-creator for new hybrids branded as Ch-Ching<sup>™</sup> (2010); Dick Clark<sup>™</sup> (2011); and Pink Home Run<sup>™</sup> (2011). My newest roses have been branded as Ketchup & Mustard<sup>™</sup> (2012), Koko Loko<sup>™</sup> (2012), All a' Twitter<sup>™</sup> (2012) and Sugar Moon<sup>™</sup> (2012).

7. I am making this declaration in support of Weeks Roses' attempt to register its LIVIN' EASY trademark (Application Ser. No. 86098613).

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8. As a result of my work at Weeks Roses and my educational background, I am well aware of the differences between the generic cultivar name assigned to newly developed roses and the commercial trademarks under which these same roses are sold and distributed.

9. I have personal knowledge that Weeks Roses has been using LIVIN' EASY as a trademark on one of its rose product lines and that this trademark has been in continuous use for over 15 years. To the best of my knowledge, Weeks Roses is the only company using the LIVIN' EASY trademark for roses.

10. Furthermore, the cultivar name for the generic rose varietal that Weeks Roses sells under its LIVIN' EASY trademark is "HARwelcome." It is my understanding that the United States Patent and Trademark Office ("USPTO") has formed an erroneous belief that the cultivar name for this plant product is "livin' easy." I am offering this Declaration in an effort to inform the USPTO of the erroneous conclusion it has made. LIVIN' EASY is the trademark. "HARwelcome" is the cultivar name.

11. Weeks Roses is the owner of United States Plant Patent No. 9161 ("the 9161 Plant Patent"). A copy of that patent has been attached to this Declaration as Exhibit A. The 9161 Plant Patent clearly shows that the cultivar name is "HARwelcome." This is the generic name for the rose distributed by Weeks Roses under the LIVIN' EASY trademark.

12. Attached to this Declaration are Exhibits B, C, D, E and F. Each of these Exhibits contains a document referenced by the Trademark Examiner when refusing to register the LIVIN' EASY trademark. The Trademark Examiner has taken the position that unrelated third parties are using LIVIN' EASY as the cultivar name for the generic rose sold and distributed by Weeks Roses.

13. To the extent these unrelated third parties may indeed be erroneously and inappropriately using Weeks Roses' LIVIN' EASY trademark as a cultivar name, Weeks Roses wishes to thank the Trademark Examiner for bringing this erroneous and inappropriate use of the LIVIN' EASY trademark to the attention of Weeks Roses.

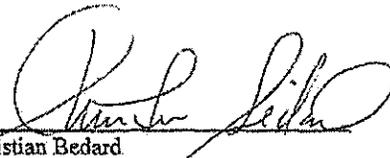
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14. I do note however, that the documents attached as Exhibits C, D, E and F to this Declaration are the same article. Therefore, the Trademark Examiner has really only found two inappropriate third-party uses of the LIVIN' EASY trademark. In light of this revelation, attached as Exhibit G is a copy of the letter sent by Weeks Roses to the operator of the referenced website requesting that the website be immediately modified to begin using the actual cultivar name, "HARwelcome", when referring to the generic rose highlighted on the website, instead of the LIVIN' EASY trademark. Also, attached as Exhibit H is a copy of the letter sent by Weeks Roses to each of the three authors of the published article discovered by the Trademark Examiner. In that letter, each of the authors have been requested to immediately begin using the actual cultivar name, "HARwelcome", when referring to the generic name of the rose identified in their published article, rather than the LIVIN' EASY trademark.

15. Based on my experience in the live plant field, it is my understanding Weeks Roses is well-known in the industry and that most persons in the industry associate the LIVIN' EASY trademark with Weeks Roses with respect to roses, and that most persons in the industry are aware that cultivar name for this generic living plant is "HARwelcome."

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any registration issued thereon.

Date December 16<sup>th</sup>, 2014

By   
Christian Bedard

CPS PAS1326021.1-11/17/14 11:33 AM

# **EXHIBIT 2**

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Mark : LIVIN' EASY  
Serial No. : 86098613  
Filed : October 22, 2013  
Applicant : Early Morning LLC dba Weeks Roses  
  
Law Office : 102  
Examiner : Cimmerian Coleman  
  
Docket No. : 73780/W255

Declaration of David H. Byrne in support of "LIVIN' EASY" trademark application

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Post Office Box 29001  
Glendale, CA 91209-9001

Commissioner:

I, David H. Byrne, hereby declare as follows:

1. I am a Professor and the Basye Endowed Chair in Rose Genetics in the Department of Horticultural Sciences at Texas A&M University, College Station, Texas, 77843-2133.
2. I received my B.S. in Plant Science from Rutgers University in 1975 and my Ph.D. in Plant Breeding in 1980 from Cornell University. Currently, I am a Member of the Graduate Faculty of Texas A&M University and am eligible to serve as the Chair, Co-Chair and am a Member of Graduate Student Advising Committees. I became a Member of the Graduate Faculty in August 1984.
3. My research areas include stone fruit and rose breeding and genetics.
4. The fruit breeding research involves peach, plum and apricot cultivar development for medium and low-chill regions, development of *in vitro* embryo rescue and

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regeneration techniques as aids in practical breeding, development of rootstocks tolerant to calcareous soils, characterization and comparison of cultivated and wild *Prunus* germplasm with isozyme, RAPD, and morphological characters and the use of these markers in breeding programs.

5. The rose breeding research involves the development of blackspot resistant rose germplasm, utilization of traits from diploid rose species by creating artificial amphidiploids, genetics of commercially important traits and marker loci in families derived from interspecific hybrids, and the use of genetic markers as an aid in the selection of commercially important traits and for the characterization and comparison of wild and cultivated rose germplasm.

6. Attached as Exhibit A to this Declaration is a list of my Research Publications: (i) Referred Journal Articles; (ii) Popular Articles; (iii) Review Articles; and (iv) Abstracts.

7. I am making this declaration in support of Early Morning LLC dba Weeks Roses ("Weeks Roses") attempt to register its LIVIN' EASY trademark (Application Ser. No. 86098613) in the United States.

8. I have been aware of Weeks Roses for over 15 years and am familiar with many of its plant products. Weeks Roses is well known throughout the rose industry and has become synonymous with the distribution and sales of top quality roses throughout the United States. Weeks Roses has had this stellar reputation in the rose industry for decades.

9. As part of my duties in the Department of Horticultural Sciences at Texas A&M, I routinely and regularly encounter products and brands used by Weeks Roses. In this regard, I am intimately aware of Weeks Roses and its use of the LIVIN' EASY trademark with respect to one of its rose product offerings. I have been aware of Weeks Roses LIVIN' EASY trademark being used for roses for over 15 years and I readily identify Weeks Roses as the source associated with the LIVIN' EASY trademark for one line of its rose products. To the best of my knowledge, Applicant Weeks Roses is the only company using the LIVIN' EASY trademark for roses.

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10. Furthermore, the cultivar name for the generic rose varietal that Applicant Weeks Roses sells under its LIVIN' EASY trademark is "HARwelcome." It is my understanding that the United States Patent and Trademark Office ("USPTO") has formed an erroneous belief that the cultivar name for this plant product is "Livin' Easy." I am offering this Declaration in an effort to inform the USPTO of the erroneous conclusion it has made. LIVIN' EASY is the trademark. "HARwelcome" is the cultivar name.

11. Based on my experience in the live plant field, it is my understanding Applicant Weeks Roses is well-known in the industry and persons in the industry associate the LIVIN' EASY trademark with Applicant Weeks Roses with respect to roses, and that persons in the industry are aware that the cultivar name for this generic living plant is "HARwelcome."

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any registration issued thereon.

Date 12/2/2014

By David H. Byrne  
David H. Byrne

Serial No. 86/098,613

**EXHIBIT A**

## Research Publications

### Referred Journal Articles

- Byrne, D.H., W. Black, Y. Ma and H.B. Pemberton. 1995. The use of amphidiploidy in the development of blackspot resistant rose germplasm. *Acta Hort.* 424: 269-272
- Ballard, R., S. Rajapakse, A. Abbot, and D.H. Byrne. 1996. DNA markers in rose and their use for cultivar identification and genome mapping. *Acta Hort.* 424:265-268.
- Ma, Y. and D.H. Byrne and J. Chen. 1996. Propagation of rose species in vitro. *IVCDB-Plant* 32:103-108.
- Ma, Y., M. Nurul Islam-Faridi, C. F. Crane, D. M. Stelly, H. J. Price, and D. H. Byrne. 1996. A new procedure to prepare slides of metaphase chromosomes of roses. *HortScience* 31(5):855-857.
- Kim, Y. and D. H. Byrne. 1996. Interspecific hybrid verification of *Rosa* with isozymes. *HortScience* 31(7):1207-1209.
- Ma, Y., C. F. Crane, and D.H. Byrne. 1996. Meiotic behavior of hybrids involving *Rosa laevigata*. *Cytologia* 61:457-463.
- Ma, Y., N. Islam-Faridi, C.F. Crane, Y. Ji, D. Stelly, J. Price, and D.H. Byrne. 1997. In situ hybridization of ribosomal DNA to rose chromosomes. *J. Hered.* 88(2):158-161.
- Ma, Y., D.H. Byrne, and J. Chen. 1997. Amphidiploid induction from diploid rose interspecific hybrids. *HortScience* 32(2):292-295.
- Ma, Y., C.F. Crane, and D.H. Byrne. 1997. Karyotypic relationships among some *Rosa* species. *Caryologia* 50(3-4):317-326.
- Jan, C. H., D. H. Byrne, J. Manhart, and H. Wilson. 1999. Rose germplasm analysis with RAPD markers. *HortScience*, 34(2):341-345.
- Ma, Y., C. F. Crane, and D. H. Byrne. 2000. Meiotic behavior in a tetraploid rose and its progeny. *HortScience* 35(6): 1127-1131.
- Rajapakse, S., D. H. Byrne, L. Zhang, N. Anderson, K. Arumuganathan, and R.E. Ballard. 2001. Two genetic linkage maps of tetraploid roses. *Theor. Appl. Genet.* 103:575-583.
- Rajapakse, S., L. Zhang, R.E. Ballard, and D.H. Byrne. 2001. AFLP marker development in rose for genetic mapping: comparison of three restriction enzyme pairs. *Acta Hort.* 546:619-627.
- Anderson, N. D.H. Byrne, J. Sinclair, and A. M. Burrell. 2002. Cooler temperatures during germination improves survival of embryo cultured peach seed. *HortScience* 37:402-403.
- Ma, Y. and D. H. Byrne. 2003. Rose cytologia. *Rose Encyclopedia*. Elsevier.
- Byrne, D. H. and Y. Ma. 2003. Meiosis in Roses. *Rose Encyclopedia*. Elsevier.
- Byrne, D. H. and Y. Ma. 2003. Amphidiploidy in Roses. *Rose Encyclopedia*. Elsevier.
- Byrne, D. H. 2003. Marker-assisted Selection in Roses. *Rose Encyclopedia*. Elsevier.
- Byrne, D.H., W. Black, Y. Ma and H.B. Pemberton. 1995. The use of amphidiploidy in the development of blackspot resistant rose germplasm. *Acta Hort.* 424: 269-272.
- Ballard, R., S. Rajapakse, A. Abbot, and D.H. Byrne. DNA markers in rose and their use for cultivar identification and genome mapping. *Acta Hort.* 424:265-268.

### Popular Articles

- Byrne, D.H. 1993. Robert E. Basye chair in rose genetics. *The Rose*, Spring. p. 50-51.
- Black, W.A., D.H. Byrne and H.B. Pemberton. 1994. Field study of black spot resistance in rose. Handout for rose groups.
- Byrne, D.H. 1994. The Basye Chair in Rose Genetics: Rose research at Texas A&M University. Summary of talk given at the Tenth Huntington Symposium of Old Roses. Given to rose organizations and individuals that are interested in the ongoing work.

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- Byrne, D.H. 1995. The Basye Chair in rose genetics and breeding. Heirloom Old Garden Roses. 1995:41.
- Byrne, D. H. 1996. Towards blackspot free roses. Victorian Rose News. Summer, 1995-96:16-19.
- Byrne, D. H. 1996. Rose research at Texas A&M University. The Basye Chair in Rose Genetics. Australian Rose Annual. 1996:91-96.
- Byrne, D. H. 1996. Amphidiploidy and rose breeding for disease resistance. Potpourri of Roses. July newsletter.
- Byrne, D.H., Y. Ma, and H.B. Pemberton. 1997. The Basye Chair in rose genetics and breeding. The Texas Horticulturist 24(4):9,11.
- Byrne, D.H., Y. Ma, and H.B. Pemberton. 1997. Rose breeding at Texas A&M University. Landscape Plant Newsletter, Fall.
- Byrne, D.H. 1997. The Basye Chair in Rose breeding and genetics at Texas A&M University. NMPPro Magazine, Oct: 55-56.
- Rajapakse, S., R. Ballard, and D. H. Byrne. 1998. Genetic mapping of blackspot resistance in roses. American Rose Magazine July: 20-21.
- Davidson, C. G., D. Byrne, P. Lim, Y. Ma, K. Zuzek, and M. Shoup. 1998. Rose germplasm collection trip to China. Landscape Plant Newsletter, Spring issue.
- Rajapakse, S. and D.H. Byrne. 2001. Gene map speeds selection of commercial traits. FlowerTECH 4(4): 24-27.
- Phillips, K. and D. H. Byrne. 2002. Rose Breeding Blooms from Backyard to Genetics Lab. <http://agnews.tamu.edu/dailynews/stories/HORT/Jun1102a.htm>

#### Review Articles

- Ma, Y. and D. H. Byrne. 2003. Rose caryologia. Rose Encyclopedia. Elsevier.
- Byrne, D. H. and Y. Ma. 2003. Meiosis, p. 273-279. Rose Encyclopedia. Elsevier.
- Byrne, D. H. and Y. Ma. 2003. Amphidiploidy, p. 11-15. Rose Encyclopedia. Elsevier.
- Byrne, D. H. 2003. Marker-Assisted Selection, p. 350-357. Rose Encyclopedia. Elsevier.

#### Abstracts

- Ma, Y., D.H. Byrne, J. Chen and A. Byrne. 1994. Multiplication of rose species in vitro. HortScience 29(5):431.
- Black, W.A., D.H. Byrne and H.B. Pemberton. 1994. Field study of black spot resistance in rose. HortScience 29(5):525.
- Kim, Y. and D.H. Byrne. 1994. Biosystematic classification of genus Rosa using isozyme polymorphisms. HortScience 29(5):483.
- Ma, Y., D.H. Byrne and D.M. Stelly. 1995. Karyotypic relationships among some Rosa species. HortScience 30(4):860.
- Byrne, D.H., Y. Ma, W. Black and H.B. Pemberton. 1995. Amphidiploids as a source of blackspot resistance in rose germplasm development. HortScience 30(4):778.
- Black, W.A., D.H. Byrne and H.B. Pemberton. 1995. Protected/unprotected study of blackspot resistance in rose. HortScience 30(4):778.
- Ma, Y., D.H. Byrne and J. Chen. 1995. Colchicine-induced amphidiploids of rose interspecific hybrids. HortScience 30(4):778.
- Byrne, D.H., W. Black, Y. Ma and H.B. Pemberton. 1995. The use of amphidiploidy in the development of blackspot resistant rose germplasm. 2nd International Rose Symposium. Feb. 1995. INRA/ISHS.
- Ballard, R., S. Rajapakse, A. Abbott, and D.H. Byrne. 1995. DNA markers for mapping the rose genome. 2nd International Rose Symposium. Feb. 1995. INRA/ISHS.

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- Ma, Y., M. Islam-Faridi, C.F. Crane, Y. Ji, D.M. Stelly, H.J. Price, and D.H. Byrne. 1996. In situ hybridization of ribosomal DNA to rose. Plant Genome IV. San Diego, CA. Jan., 1996.
- Ma, Y., D. H. Byrne, and K. Porter. 1996. Cytological and morphological characterization of amphidiploids for rose breeding. HortSci. 31(4):627.
- Byrne, D. H. and Y. Ma. 1998. Affinities of *Rosa roxburghii* Tratt. HortScience 33:493.
- Ma, Y. and D. H. Byrne. 1998. Meiotic behavior in an amphidiploid rose and its hybrid progeny. HortScience 33: 483
- Rajapakse, S., R. E. Ballard, and D. H. Byrne. 1999. Towards a gene map of rose. Final Program and abstracts guide: International Plant and Animal Genome VII Conference, p. 52.
- Rajapakse, S., L. Zhang, D. H. Byrne, N. Anderson, and R. E. Ballard. 2000. Application of single dose markers in mapping of tetraploid rose. International Plant and Animal Genome VIII.
- Zhang, L., R. E. Ballard, A. G. Abbott, D. H. Byrne, and S. Rajapakse. 2000. Integrating microsatellite markers into rose genetic map. International Plant and Animal Genome VIII.
- Pemberton, H. B. and D. H. Byrne. 2000. Field resistance of rose hybrids, species, and species hybrids as part of a rose improvement program. International Rose Symposium, Israel, May, 2000.
- Anderson, N., and D. H. Byrne. 2000. The effects of leaching and stratification media on *Rosa* spp. HortScience 35:401.
- Kim, C-K, D. H. Byrne, J. Ou, and J. Chung. 2002. Somatic embryogenesis from in vitro derived explants of rose. International Horticultural Congress, Toronto, Aug. 2002.
- Kim, C-K, D. H. Byrne, and J. Chung. 2002. *Agrobacterium tumefaciens*-mediated transformation and transgenic plant regeneration of rose. International Horticultural Congress, Toronto, Aug. 2002.
- Burrell, M. A. and D. H. Byrne. 2003. Study in the embryogenic callus potential of *Rosa hybrida* L. cvs. Tournament of Roses x Baby Love progeny. HortScience 38(5):861.

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# **EXHIBIT 3**

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Mark : LIVIN' EASY  
Serial No. : 86098613  
Filed : October 22, 2013  
Applicant : Early Morning LLC dba Weeks Roses  
  
Law Office : 102  
Examiner : Cimmerian Coleman  
  
Docket No. : 73780/W255

Declaration of Keith Zary in support of "LIVIN' EASY" trademark application

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Post Office Box 29001  
Glendale, CA 91209-9001

Commissioner:

I, Keith Zary, hereby declare as follows:

1. I am the Director of Ornamental Research and Development at Gardens Alive, Inc. ("Gardens Alive") with offices at 110 West Elm Street, Tipp City, Ohio 45371. My responsibilities include directing all research activities including breeding, trialing and protecting all ornamental plants introduced by the Gardens Alive! brands. I have held this position since October, 2010, and have been with Gardens Alive since October, 2010. I am making this declaration in support of Early Morning LLC dba Weeks Roses ("Weeks Roses") attempt to register its LIVIN' EASY trademark (Application Ser. No. 86098613).

2. I have been aware of Weeks Roses for over 30 years and am familiar with many of its plant products. Weeks Roses is well known throughout the rose industry and has become synonymous with the distribution and sales of top quality roses throughout the United States. Weeks Roses has had this stellar reputation in the rose industry for decades.

Serial No. 85/943,100

3. As part of my duties at Gardens Alive, I routinely and regularly encounter products and brands used by Weeks Roses. In this regard, I am intimately aware of Weeks Roses and its use of the LIVIN' EASY trademark with respect to one of its rose product offerings. I have been aware of Weeks Roses LIVIN' EASY trademark being used for roses for over 15 years and I readily identify Weeks Roses as the source associated with the LIVIN' EASY trademark for one line of its rose products. To the best of my knowledge, Applicant Weeks Roses is the only company using the LIVIN' EASY trademark for roses.

4. Furthermore, the cultivar name for the generic rose varietal that Applicant Weeks Roses sells under its LIVIN' EASY trademark is "HARwelcome." It is my understanding that the United States Patent and Trademark Office ("USPTO") has formed an erroneous belief that the cultivar name for this plant product is "livin' easy." I am offering this Declaration in an effort to inform the USPTO of the erroneous conclusion it has made. LIVIN' EASY is the trademark. "HARwelcome" is the cultivar name.

5. Based on my experience in the live plant field, it is my understanding Applicant Weeks Roses is well-known in the industry and persons in the industry associate the LIVIN' EASY trademark with Applicant Weeks Roses with respect to roses, and that persons in the industry are aware that cultivar name for this generic living plant is "HARwelcome."

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any registration issued thereon.

Date November 26, 2014

By Keith Zary  
Keith Zary

# **EXHIBIT 4**

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Mark : LIVIN' EASY  
Serial No. : 86098613  
Filed : October 22, 2013  
Applicant : Early Morning LLC dba Weeks Roses

Law Office : 102  
Examiner : Cimmerian Coleman

Docket No. : 73780/W255

Declaration of Bent Petersen in support of "LIVIN' EASY" trademark application

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Post Office Box 29001  
Glendale, CA 91209-9001

Commissioner:

I, Bent Petersen, hereby declare as follows:

1. I am the Green Goods Buyer for Armstrong Garden Centers ("AGC") with offices at 2200 E. Route 66, Suite 200, Glendora, CA 91740. Part of my responsibilities at AGC include buying plants from a large number of plant vendors, each capable of supplying AGC with the volume and quality of products required. I have held this position since for 14 years, and have been with AGC since 1984 (30 years).

2. AGC has been selling roses since the early 1920s, and has been operating a research and development department since the 1930s and was responsible for breeding the world-famous rose varieties "Chrysler Imperial" and "Charlotte Armstrong."

3. Throughout the 1940s and 1950s, AGC's leadership in the rose industry and its attention to excellence led to hundreds of new rose varieties, and a wide range of other types of plants. AGC commercial successes include the Boysenberry, the Babcock Peach, the Seedless

Serial No. 85/943,100

Valencia Orange, Robertson Navel Orange, the Snow Queen Nectarine, the Red Baron Peach, and the first genetic dwarf peach known as the Bonanza.

4. In the 1980s, AGC became a fully employee-owned company in an ongoing effort to maintain high horticultural standards and allowing for full control of plant quality from the start to finish of the development process.

5. AGC currently has 29 locations in Southern California and 2 locations in the San Francisco Bay area. I routinely purchase large volumes of roses and other plants for the network of AGC retail stores.

6. I am making this declaration in support of Early Morning LLC dba Weeks Roses ("Weeks Roses") attempt to register its LIVIN' EASY trademark (Application Ser. No. 86098613).

7. I have been aware of Weeks Roses for over 32 years and am familiar with many of its plant products. Weeks Roses is one of many suppliers I use for purchasing rose products. Weeks Roses is well known throughout the rose industry and has become synonymous with the distribution and sales of top quality roses throughout the United States. Weeks Roses has had this stellar reputation in the rose industry for decades.

8. As part of my duties at AGC, I routinely and regularly encounter branded products used by numerous rose and plant suppliers. Indeed, I am exposed to hundreds of trademarks adopted by AGC's numerous suppliers of roses. In this regard, I am intimately aware of Weeks Roses and its use of the LIVIN' EASY trademark with respect to one of its rose product offerings. I have been aware of Weeks Roses LIVIN' EASY trademark being used for roses for over 15 years and I readily identify Weeks Roses as the source associated with the LIVIN' EASY trademark for one line of its rose products. To the best of my knowledge, Applicant Weeks Roses is the only company using the LIVIN' EASY trademark for roses.

Serial No. 85/943,100

9. As part of my duties at AGC, I am well aware of the difference between the generic cultivar/variatal name for roses and other plants, on the one hand, and the commercial trademarks used to market these same roses and other plants, on the other hand.

10. In regard to the particular brand of roses sold and marketed by Weeks Roses under the trademark LIVIN' EASY, I am aware that the cultivar name for this rose is "HARwelcome." It is my understanding that the United States Patent and Trademark Office ("USPTO") has formed an erroneous belief that the cultivar name for this plant product is "livin' easy." I am offering this Declaration in an effort to inform the USPTO of the erroneous conclusion it has made. LIVIN' EASY is the trademark. "HARwelcome" is the cultivar name.

11. Based on my experience in the live plant field, it is my understanding Applicant Weeks Roses is well-known in the industry and persons in the industry associate the LIVIN' EASY trademark with Applicant Weeks Roses with respect to roses, and that persons in the industry are aware that cultivar name for this generic living plant is "HARwelcome."

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any registration issued thereon.

Date 11-26-2014

By Bent Petersen  
Bent Petersen

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# **EXHIBIT 5**

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Mark : LIVIN' EASY  
Serial No. : 86098613  
Filed : October 22, 2013  
Applicant : Early Morning LLC dba Weeks Roses

Law Office : 102  
Examiner : Cimmerian Coleman

Docket No. : 73780/W255

Declaration of Harry Landers in support of "LIVIN' EASY" trademark application

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Post Office Box 29001  
Glendale, CA 91209-9001

Commissioner:

I, Harry Landers, hereby declare as follows:

1. I am the Curator (and Botanic Specialist II) at the Portland International Rose Test Garden located at 400 S.W. Kingston Avenue, Portland, Oregon 97205 ("the Garden").
2. The primary purpose of the Garden is to serve as a testing ground for new rose varieties. The rose testing program at the Garden is the oldest of its kind in the United States.
3. Many roses are tested in the Garden in an effort to find a variety of different characteristics which we believe consumers will desire in a garden plant including plant habit, vigor, disease resistance, color, flower, production, form, foliage, and fragrance. On average, hundreds of rose cultivars are tested each year.
4. The Garden is also one of only six testing grounds for the American Rose Society miniature rose test program; one of the top ten urban gardens in the world; and one of the top ten public gardens in the United States.

Serial No. 86/098,613

5. More than 10,000 roses representing 650 varieties can be found in the 4.5-acre Garden which draws more than 500,000 TO 650,000 visitors each year.

6. My responsibilities include overseeing the testing of the roses in the Garden and maintaining the general upkeep of the Garden and ensuring that the roses in the Garden remain vibrant.

7. I have been with the Garden since approximately 1989. I am making this declaration in support of Early Morning LLC dba Weeks Roses ("Weeks Roses") attempt to register its LIVIN' EASY trademark (Application Ser. No. 86098613).

8. I have been aware of Weeks Roses for over 25 years and am familiar with many of its plant products. Weeks Roses is well known throughout the rose industry and has become synonymous with the distribution and sales of top quality roses throughout the United States. Weeks Roses has had this stellar reputation in the rose industry for decades.

9. As a result of my responsibilities at the Garden, I am well versed in the difference between a cultivar name for a generic type of rose, and a commercial trademark under which a particular generic type of rose is sold and distributed.

10. As part of my duties at the Garden, I routinely and regularly encounter products and brands used by Weeks Roses. In this regard, I am intimately aware of Weeks Roses and its use of the LIVIN' EASY trademark with respect to one of its rose product offerings. I have been aware of Weeks Roses LIVIN' EASY trademark being used for roses for over 15 years and I readily identify Weeks Roses as the source associated with the LIVIN' EASY trademark for one line of its rose products. To the best of my knowledge, Applicant Weeks Roses is the only company using the LIVIN' EASY trademark for roses.

11. Furthermore, the cultivar name for the generic rose variety that Applicant Weeks Roses sells under its LIVIN' EASY trademark is "HARwelcome." It is my understanding that the United States Patent and Trademark Office ("USPTO") has formed an erroneous belief that the cultivar name for this plant product is "livin' easy." I am offering this Declaration in an effort

Serial No. 86/098,613

to inform the USPTO of the erroneous conclusion it has made. LIVIN' EASY is the trademark. "HARwelcome" is the cultivar name.

12. Based on my experience in the live plant field, it is my understanding Applicant Weeks Roses is well-known in the industry and persons in the industry associate the LIVIN' EASY trademark with Applicant Weeks Roses with respect to roses, and that persons in the industry are aware that cultivar name for this generic living plant is "HARwelcome."

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any registration issued thereon.

Date

Nov. 27, 2014

By

Harry Landers  
Harry Landers

MAC PAS13260072.\*-11/26/14 12:09 PM

# **EXHIBIT 6**



US00PP09161P

**United States Patent** [19]  
**Harkness**

[11] Patent Number: **Plant 9,161**  
[45] Date of Patent: **Jun. 13, 1995**

[54] **FLORIBUNDA ROSE PLANT NAMED HARWELCOME**  
[75] Inventor: **J. L. Harkness, Southwold, England**  
[73] Assignee: **Weeks Wholesale Rose Grower, Inc., Upland, Calif.**  
[21] Appl. No.: **176,131**  
[22] Filed: **Dec. 22, 1993**  
[51] Int. Cl.<sup>6</sup> ..... **A01H 5/00**  
[52] U.S. Cl. .... **Plt./22**

[58] Field of Search ..... **Plt. 22, 11, 16, 17, Plt. 25**

*Primary Examiner*—Howard J. Locker  
*Attorney, Agent, or Firm*—Christie, Parker & Hale

[57] **ABSTRACT**

A new variety of Floribunda rose suitable for garden decoration, having flowers of blended orange coloration.

1 Drawing Sheet

**1**

**BACKGROUND OF THE INVENTION**

This invention relates to a new and distinct variety of Floribunda Rose. The varietal denomination of the new variety is 'Harwelcome.' The plant is a bushy upright seedling cultivated for outdoor garden decoration and is moderately hardy. It was bred in Hitchin, Hertfordshire, United Kingdom, and has as its seed parent the variety known as 'Southampton' and as its pollen parent the variety known as 'Remember Me.'

**SUMMARY OF THE INVENTION**

Among the features which distinguish the new variety cv. Harwelcome from other presently available and known commercial rose cultivars are the following combination of characteristics: brightly colored flowers of blended apricot and orange, abundance of highly glossed bright green foliage often edged with reddish pigment and unusually high degree of resistance to blackspot. Cv. 'Harwelcome' may be propagated by cuttings, budding, grafting, layering and tissue culture.

Asexual propagation of the new variety by budding as performed in Kern County and Upland, Calif., shows that the foregoing and other distinguishing characteristics come true to form and are established and transmitted through succeeding propagations.

**COMPARISON WITH PARENT VARIETIES**

The new rose may be distinguished from its seed parent, 'Southampton' by the following combination of characteristics: whereas the new cultivar bears flowers of a blended apricot and orange coloration, the seed parent bears flowers of an apricot coloration; flowers of the seed parent have significantly more fragrance than the new seedling; and whereas 'Harwelcome' has a bushy upright medium height growth habit with very full branching, 'Southampton' has a significantly taller habit with much less branching.

The new variety may be distinguished from its pollen parent, 'Remember Me' by the following combination of characteristics: whereas the new seedling bears flowers of an apricot and orange blend coloration, the pollen parent bears flowers of a significantly darker orange coloration combined with some near brown tonations; flowers of 'Remember Me' have about 20 petals, whereas 'Harwelcome' flowers have significantly higher petalation (25 to 30); and whereas the pollen parent is classified as a Hybrid Tea, the new cultivar is properly classified as a Floribunda.

**2**

**BRIEF DESCRIPTION OF THE ILLUSTRATION**

The accompanying photograph illustrates the plant in color and shows the flowering thereof from bud to full bloom depicted in color as nearly correct as it is possible to make in a color illustration of the character. Throughout this specification, names are values based upon the Colour Chart of The Royal Horticultural Society of London, England, except where common terms of color definition are employed.

**DESCRIPTION OF THE NEW VARIETY**

The following descriptive matter pertains to roses of the new cultivar grown outdoors in August 1993 in Upland, Calif. Phenotypic expression may vary with environmental, cultural and climatic conditions, as well as differences in conditions of light and soil.

**FLOWER**

The new variety bears its flowers sometimes singly, usually three to four or more per stem. Flowers are borne in regular flat to rounded clusters on strong medium to long stems for the class. Outdoors the plant blooms very abundantly and nearly continuously during the growing season. The flowers have a slight fruity fragrance. Stem length is medium to long, generally about 25 to 42 cm.

**BUD**

The peduncle is of short to average length for the class, of average caliper, and usually erect. It is almost entirely smooth with some stipitate glands and hairs. Peduncle color is between 138A and 144A, sometimes lightly blushed on the side facing the sun with near 178C. The peduncle length is short to average, about 3 to 5 cm. The green bud is moderately small, about 1.5 to 2 cm at the widest point and about 2.5 to 3 cm in length. The opening bud is about 2 to 2.5 cm at the widest point and about 2.5 to 3 cm in length.

Before the calyx breaks, the bud is of moderately small size for the class, medium in length, and pointed to ovoid in shape. The surface of the bud bears some stipitate glands and fine hairs, with slender foliaceous parts extending beyond the tip of the bud equal to ¼ or more of its length. Bud color is between 138A and 144A, sometimes lightly blushed on the side facing the sun with near 178C, before sepals divide.

The inner surface of the sepals is covered with fine wooly tomentum; sepal margins are lined with many stipitate glands and hairs.

As the first petal opens, the bud is somewhat small to medium size for the class, medium in length, and somewhat pointed to ovoid in form. The color of the outside of the newly opened petals is between 40B and 47C with a moderately sized basal attachment zone of between 7A and 12A. The color of the inside surfaces of the newly opened petals is between 41A and 31A with a basal attachment zone of similar size and coloration. Basal attachment zone as used herein refers to the zone at the point of petal attachment. The bud does open up well and is not prevented from opening by cold, hot, wet or dry weather.

#### BLOOM

When fully open, the bloom is medium sized for the class, ranging from 9 to 10.5 cm. in diameter. Petalage is double with 25 to 30 petals and 1 to 5 petaloids arranged regularly. When partially open, the bloom form is somewhat cupped and the petals are somewhat undulated. When fully open, the bloom form is somewhat more flat to cupped and the petals are moderately loosely undulated to reflexed backward.

#### PETALS

The petals are of moderately heavy substance and of medium thickness, with inside surfaces slightly velvety and outside slightly satiny. The outer petals are very broadly obovate in shape with a mostly rounded apex. The intermediate petals are somewhat obovate to nearly round in shape with the apex usually rounded to flat. The inner petals are more narrowly obovate in shape.

#### NEWLY OPENED FLOWER

The outside surface of the outer petals is between 40C and 39C with a moderately large basal attachment zone of near 12A. The majority of the inside surface of the outer petals is between 33B and 26C with a basal attachment zone of similar size and coloration. Toward the outer edges of the petals, the coloration blushes darker to between 42B and 39A.

The outside surface of the intermediate and inner petals is between 28D and 33B with a moderately large basal attachment zone of near 12B. The inside surface of the intermediate and inner petals is between 33C and 26C. There is no blushing to a darker color.

The general tonality of the newly opened flower is between 33C and 26C with darker tones around the outer petals of between 42B and 39A.

#### THREE DAY OLD FLOWER

The outside surface of the outer and inner petals is between 33C and 41C with a moderately large basal attachment zone of near 11A. The inside surface of the outer and inner petals is between 42C and 39B with a basal attachment zone of similar size and coloration.

The general tonality of the three day old flower is between 42C and 39B.

On the spent bloom, the petals usually drop off cleanly and are not particularly affected by cold, hot, wet or dry weather.

In August, blooms on the bush growing in the garden generally last from three to four or more days. Cut roses grown outdoors and kept at normal indoor living temperatures generally last from four to five or more days.

#### MALE REPRODUCTIVE ORGANS

Stamens are average to many in number and are arranged regularly about the pistil. The filaments are of irregular medium to long length, most with anthers. The anthers are moderately small for the class and all open approximately at the same times. Anther color is near 26A when immature and near 172A at maturity. Pollen is moderate to abundant and near 15C in color.

#### FEMALE REPRODUCTIVE ORGANS

Pistils are moderately abundant in number (approximately 90). The styles are somewhat uneven, moderately short in length, average in caliper, and moderately bunched. Stigma color is near 10D. Style color is near 42C. Ovaries are usually all enclosed in the calyx.

Hips are somewhat short in length, very globular in form, and become near 30C in color when mature. The hip surface is very smooth with somewhat thick fleshy walls. The sepals fall away soon after seed set. Seeds are moderately few in number (approximately 8 to 13), and average in size.

#### FOLIAGE

The compound leaves are usually comprised of three to five and sometimes seven leaflets and are borne abundantly. The leaves are of moderate size for the class, very heavy to leathery in texture, and very glossy in finish. The leaflets are shaped moderately ovate to ovoid with somewhat acute apices and somewhat round bases. Their margins are usually doubly serrate. Leaflets are about 3.5 to about 7 cm in length and about 2 to about 4.5 in width at the widest point. Leaves are about 9 to 13 cm in length and about 7 to about 9 cm in width at the widest point.

The upper surface of the very mature leaf is between 137A and 139A. The under surface of the very mature leaf is between 191B and 194A. The upper surface of a newly mature leaf is between 137B and 137C and often very finely edged with between 183A and 175A. The upper surface of the young leaf is between 146C and 137D, sometimes lightly suffused and often edged with between 183A and 175A. The under surface of the young leaf is between 146C and 137D, usually heavily suffused with between 183C and 175C.

The rachis is average in caliper and moderately rough to grooved with some hairs and stipitate glands on the edges of the upper side. The underside of the rachis is moderately rough with some stipitate glands and few prickles.

The stipules are of medium width, short to medium length, and have straight points that usually turn out at an angle of less than 90 degrees.

The plant displays a very high degree of resistance to blackspot and an above average degree of resistance to powdery mildew and rust as compared to other commercial varieties grown under comparable conditions in Upland, Calif.

#### GROWTH

The plant has a bushy upright medium height habit with very full branching. It displays very vigorous growth and the canes are of medium to heavy caliper for the class. The plant achieves a medium height of about 105 to 130 cm and a width of about 90 to 115 cm.

The color of the major stems are near 146B. They bear several large prickles which are moderately long for the class. The large prickles are almost straight with

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a somewhat short narrow base; prickle color is near 177A. The major stem bears many small prickles of similar shape and coloration.

The color of the branches are between 144A and 138B. They bear several large prickles which are moderately long for the class. The large prickles are almost straight with a somewhat short narrow base; prickles color is near 164B. The branches bear several small prickles of similar shape and coloration and some coarse hairs.

The color of the new shoots is between 144A and 138B, sometimes lightly suffused with near 183C. They

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bear several large prickles which are moderately long for the class. The large prickles are almost straight with a somewhat short narrow base; prickle color is between 183C and 175B. The shoots also bear many small prickles of similar shape and coloration and many coarse hairs.

I claim:

1. A new and distinct variety of Floribunda rose plant substantially as described and illustrated herein.

\* \* \* \* \*

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U.S. Patent

June 13, 1995

Plant 9,161



UNITED STATES PATENT AND TRADEMARK OFFICE  
**CERTIFICATE OF CORRECTION**

PATENT NO. : Plant 9,161  
DATED : June 13, 1995  
INVENTOR(S) : J.L. Harkness

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

Column 3, line 39, change "39C" to -- 39A --.

Column 5, line 12, change "leightly" to -- lightly --.

Signed and Sealed this  
Sixteenth Day of January, 1996

Attest:



BRUCE LEHMAN

Attesting Officer

Commissioner of Patents and Trademarks

# **EXHIBIT 7**

**To:** Early Morning LLC ([pto@cph.com](mailto:pto@cph.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86098613 - LIVIN' EASY - 73780/W225  
**Sent:** 4/17/2014 7:02:12 AM  
**Sent As:** ECOM102@USPTO.GOV  
**Attachments:** [Attachment - 1](#)  
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[Attachment - 6](#)  
[Attachment - 7](#)  
[Attachment - 8](#)

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

**U.S. APPLICATION SERIAL NO.** 86098613

**MARK:** LIVIN' EASY

**\*86098613\***

**CORRESPONDENT ADDRESS:**

GREGORY S. LAMPERT  
CHRISTIE, PARKER & HALE, LLP  
PO BOX 29001  
GLENDALE, CA 91209-9001

**CLICK HERE TO RESPOND TO**  
<http://www.uspto.gov/trademarks/teas/r>

**APPLICANT:** Early Morning LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO :**

73780/W225

**CORRESPONDENT E-MAIL ADDRESS:**

[pto@cph.com](mailto:pto@cph.com)

**OFFICE ACTION**

**STRICT DEADLINE TO RESPOND TO THIS LETTER**

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS** OF THE ISSUE/MAILING DATE BELOW.

**ISSUE/MAILING DATE: 4/17/2014**

This application was approved for publication on February 6, 2014. *See* 37 C.F.R. §2.80. However, approval of the application has been withdrawn to address the issue(s) below. *See* TMEP §706.01. The trademark examining attorney apologizes for any inconvenience this may cause applicant.

### **Search Results**

The trademark examining attorney has searched the Office's database of registered and pending marks and has found no conflicting marks that would bar registration under Trademark Act Section 2(d). TMEP §704.02; *see* 15 U.S.C. §1052(d).

### **Refusal – Applied-For Mark Is a Varietal Name**

Registration is refused because the applied-for mark is a varietal name for the identified goods and as such, does not function as a trademark to indicate the source of applicant's goods and to identify and distinguish them from others. Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§1051-1052, 1127; *see* TMEP §1202.12. *See* attached evidence from various on-line sources showing that LIVIN' EASY is the varietal name for a rose.

Varietal or cultivar names are designations used to identify cultivated varieties or subspecies of live plants or agricultural seeds. TMEP §1202.12. They are generic and cannot be registered as trademarks because they are the common descriptive names of plants or seeds by which such varieties are known to the U.S. consumer. *Id.* Moreover, a consumer "has to have some common descriptive name he can use to indicate that he wants one [particular] variety of apple tree, rose, or whatever, as opposed to another, and it is the varietal name of the strain which naturally and commonly serves this purpose." *In re Pennington Seed, Inc.*, 466 F.3d 1053, 1057, 80 USPQ2d 1758, 1761 (Fed. Cir. 2006) (quoting *In re Hilltop Orchards & Nurseries, Inc.*, 206 USPQ 1034, 1036 (TTAB 1979)); *see In re Delta & Pine Land Co.*, 26 USPQ2d 1157, 1159 n.4 (TTAB 1993).

### **Information Required Regarding Applied-For Mark**

To permit proper examination of the applied-for mark, applicant must indicate the following:

- (1) Whether LIVIN' EASY has ever been used as a varietal or cultivar name?
- (2) Whether a plant patent, utility patent, or certificate for plant variety protection exists under such name?

TMEP §1202.12; *see* 37 C.F.R. §2.61(b).

Failure to comply with a request for information can be grounds for refusing registration. *In re AOP LLC*, 107 USPQ2d 1644, 1651 (TTAB 2013); *In re DTI P'ship LLP*, 67 USPQ2d 1699, 1701-02 (TTAB 2003); TMEP §814.

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#### **Telephone/E-mail for Clarification Recommended**

If applicant has questions regarding this Office action, please telephone or e-mail the assigned trademark examining attorney. All relevant e-mail communications will be placed in the official application record; however, an e-mail communication will not be accepted as a response to this Office action and will not extend the deadline for filing a proper response. See 37 C.F.R. §2.191; TMEP §§304.01-.02, 709.04-.05. Further, although the trademark examining attorney may provide additional explanation pertaining to the refusal(s) and/or requirement(s) in this Office action, the trademark examining attorney may not provide legal advice or statements about applicant's rights. See TMEP §§705.02, 709.06.

/Cimmerian Coleman/  
U.S. Patent and Trademark Office  
Trademark Examining Attorney  
Law Office 102  
571.272.9146  
cimmerian.coleman@uspto.gov

**TO RESPOND TO THIS LETTER:** Go to [http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp). Please wait 48-72 hours from the issue/ mailing date before using the Trademark Electronic Application System (TEAS), to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail [TEAS@uspto.gov](mailto:TEAS@uspto.gov). For questions about the Office action itself, please contact the assigned trademark examining attorney. **E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.**

**All informal e-mail communications relevant to this application will be placed in the official application record.**

**WHO MUST SIGN THE RESPONSE:** It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the

Trademark Assistance Center by e-mail at [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

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[Plant Cell Rep.](#) 2007 Feb;26(2):153-60. Epub 2006 Sep 14.

## 2,4,5-Trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar "Livin' Easy" (Rosa sp.).

Estabrooks T<sup>1</sup>, Browne R, Dong Z.

### Author Information

#### Abstract

Somatic embryogenesis (SE) offers vast potential for the clonal propagation of high-value roses. However, some recalcitrant cultivars unresponsive to commonly employed SE-inducing agents and low induction rates currently hinder the commercialization of SE technology in rose. Rose SE technology requires improvement before it can be implemented as a production system on a commercial scale. In the present work, we assessed 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), a synthetic auxin not previously tested in rose, for its effectiveness to induce SE in the rose cultivar "Livin' Easy" (Rosa sp.). We ran a parallel comparison to the commonly used 2,4-dichlorophenoxyacetic acid (2,4-D). We tested each auxin with two different basal media: Murashige and Skoog (MS) basal medium and woody plant medium (WPM). MS medium resulted in somatic embryo production, whereas WPM did not. 2,4,5-T induced SE over a greater concentration range than 2,4-D's and resulted in significantly greater embryo yields. 2,4,5-T at a concentration of 10 or 25 microM was better for embryonic tissue initiation than 2,4,5-T at 5 microM. Further embryo development occurred when the tissue was transferred to plant growth regulator (PGR) free medium or media with 40% the original auxin concentration. However, the PGR-free medium resulted in a high percentage of abnormal embryos (32.31%) compared to the media containing auxins. Upon transfer to germination medium, somatic embryos successfully converted into plantlets at rates ranging from 33.3 to 95.2%, depending on treatment. Survival rates 3 months ex vitro averaged 14.0 and 55.6% for 2,4-D- and 2,4,5-T-derived plantlets, respectively. Recurrent SE was observed in 60.2% of the plantlets growing on germination medium. This study is the first report of SE in the commercially valuable rose cultivar 'Livin' Easy' (Rosa sp.) and a suitable methodology was developed for SE of this rose cultivar.

PMID: 16972095 [PubMed - indexed for MEDLINE]

Publication Types, MeSH Terms, Substances

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- Role of PGRs and inhibitors in induction and control of : [Indian J Exp Biol. 2009]
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Page 1

Plant Cell Rep (2007) 26:153–160  
DOI 10.1007/s00299-006-0231-5

CELL BIOLOGY AND MORPHOGENESIS

2,4,5-Trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar ‘Livin’ Easy’ (*Rosa* sp.)

Tammy Estabrooks · Robin Browne · Zhongmin Dong

Received: 6 March 2006 / Revised: 16 July 2006 / Accepted: 11 August 2006 / Published online: 14 September 2006  
© Springer-Verlag 2006

**Abstract** Somatic embryogenesis (SE) offers vast potential for the clonal propagation of high-value roses. However, some recalcitrant cultivars unresponsive to commonly employed SE-inducing agents and low induction rates currently hinder the commercialization of SE technology in rose. Rose SE technology requires improvement before it can be implemented as a production system on a commercial scale. In the present work, we assessed 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), a synthetic auxin not previously tested in rose, for its effectiveness to induce SE in the rose cultivar ‘Livin’ Easy’ (*Rosa* sp.). We ran a parallel comparison to the commonly used 2,4-dichlorophenoxyacetic acid (2,4-

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**Keywords** *Rosa* · Somatic embryogenesis · Plant growth regulator · Auxin

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**Keywords** *Rosa* · Somatic embryogenesis · Plant growth regulator · Auxin

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**Keywords** *Rosa* · Somatic embryogenesis · Plant growth regulator · Auxin



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Estabrooks, Tammy; Browne, Robin; Dong, Zhongmin, 2007: 2,4,5-Trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar 'Livin' Easy' Rosa sp.. Plant Cell Reports 26(2): 153-160

Somatic embryogenesis (SE) offers vast potential for the clonal propagation of high-value roses. However, some recalcitrant cultivars unresponsive to commonly employed SE-inducing agents and low induction rates currently hinder the commercialization of SE technology in rose. Rose SE technology requires improvement before it can be implemented as a production system on a commercial scale. In the present work, we assessed 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), a synthetic auxin not previously tested in rose, for its effectiveness to induce SE in the rose cultivar 'Livin' Easy' (Rosa sp.). We ran a parallel

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SE in the rose cultivar 'Livin' Easy' (Rosa sp.). We tested a parallel comparison to the commonly used 2,4-dichlorophenoxyacetic acid (2,4-D). We tested each auxin with two different basal media: Murashige and Skoog (MS) basal medium and woody plant medium (WPM). MS medium resulted in somatic embryo production, whereas WPM did not. 2,4,5-T induced SE over a greater concentration range than 2,4-D's and resulted in significantly greater embryo yields. 2,4,5-T at a concentration of 10 or 25  $\mu$ M was better for embryogenic tissue initiation than 2,4,5-T at 5  $\mu$ M. Further embryo development occurred when the tissue was transferred to plant growth regulator (PGR) free medium or media with 40% the original auxin concentration. However, the PGR-free medium resulted in a high percentage of abnormal embryos (32.31%) compared to the media containing auxins. Upon transfer to germination medium, somatic embryos successfully converted into plantlets at rates ranging from 33.3 to 95.2%, depending on treatment. Survival rates 3 months ex vitro averaged 14.0 and 55.6% for 2,4-D- and 2,4,5-T-derived plantlets, respectively. Recurrent SE was observed in 60.2% of the plantlets growing on germination medium. This study is the first report of SE in the commercially valuable rose cultivar 'Livin' Easy' (Rosa sp.) and a suitable methodology was developed for SE of this rose cultivar.

### Other Research

**Cross presentation of antigen on MHC class II via the draining lymph node after corneal transplantation in mice:** We investigated Ag trafficking from the cornea and T effector cell activation in secondary lymphoid tissue after corneal transplantation. In preliminary experiments, the central cornea was shown to contain a population of CD45(+), CD11b(+), CD11c-...

**Occult sleep-disordered breathing in stable congestive heart failure:** Objective: To determine the prevalence and effect of sleep-disordered breathing in ambulatory patients with stable, optimally treated congestive heart failure. Design: A prospective, longitudinal study. Setting: Referral sleep laboratory of a Depa...

**Evaluation of actinomycetes as growth inhibitors of *Fusarium oxysporum* f. sp. *dianthi* in carnations (*Dianthus caryophyllus* var *rosana*):** Three actinomycetes, i.e. *Pseudonocardia* sp., *Streptomyces* sp. and *Streptosporangium album*, were screened for their antagonistic effect on the causal organism of vascular withering (*Fusarium oxysporum* f.sp. *dianthi*) in carnation. Inoculation of mi...

**Autolytic generation of dialyzable components in extracts of *viscum album* exhibiting different mechanisms of enhancement of human nk cytotoxicity against tumor cells:** Fresh *Viscum album* extract and *V. album* extract Iscador originally contained non-dialysable components which drastically increased NK cytotoxicity when present during a 4h cytotoxicity assay in cocultures of

Studies on cyclomannin: A new total synthesis of O, S-bis(ethoxycarbonyl)thiamine

The effects of canopy removal on holdfast growth in macrocystis pyrifera phaeophyta laminariales

Formation of natural thiophene derivatives from acetylenes by tagetes patula

Lipopolysaccharide increases A2A and A2B adenosine receptor transcripts in microglial cultures

Demonstration of linezolid efficacy in a murine, anthrax-spore inhalation challenge model

Crop residue management for sustaining the soil fertility and productivity of potato based cropping systems in Punjab

Life, Earth & Health Sciences Research: Chapter 19001

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acid, extracted from purified virus with phenol-SDS, was  
noninfectious. Following electrophoresis of the extracted nucleic  
acid in 2% polyacrylamide gels containing 0.5% agarose, 3 major  
and 2 minor bands were observed. The amount of...](#)

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affecting herbicide residues in soils are discussed. 17 references.](#)

[Mating interactions between \*Schistosoma haematobium\* and \*S.\*  
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**To:** Early Morning LLC ([pto@cph.com](mailto:pto@cph.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86098613 - LIVIN' EASY - 73780/W225  
**Sent:** 4/17/2014 7:02:13 AM  
**Sent As:** ECOM102@USPTO.GOV  
**Attachments:**

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**IMPORTANT NOTICE REGARDING YOUR  
U.S. TRADEMARK APPLICATION**

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED  
ON **4/17/2014** FOR U.S. APPLICATION SERIAL NO. 86098613

Please follow the instructions below:

**(1) TO READ THE LETTER:** Click on this [link](#) or go to <http://tsdr.uspto.gov>, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

**(2) TIMELY RESPONSE IS REQUIRED:** Please carefully review the Office action to determine (1) how to respond, and (2) the applicable response time period. Your response deadline will be calculated from **4/17/2014** (or sooner if specified in the Office action). For information regarding response time periods, see <http://www.uspto.gov/trademarks/process/status/responsetime.jsp>.

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**(3) QUESTIONS:** For questions about the contents of the Office action itself, please contact the assigned trademark examining attorney. For *technical* assistance in accessing or viewing the Office action in the Trademark Status and Document Retrieval (TSDR) system, please e-mail [TSDR@uspto.gov](mailto:TSDR@uspto.gov).

**WARNING**

**Failure to file the required response by the applicable response deadline will result in the**

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# **EXHIBIT 8**

**To:** Early Morning LLC ([pto@cph.com](mailto:pto@cph.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86098613 - LIVIN' EASY - 73780/W225  
**Sent:** 6/22/2014 9:10:45 PM  
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**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

**U.S. APPLICATION SERIAL NO.** 86098613

**MARK:** LIVIN' EASY

**\*86098613\***

**CORRESPONDENT ADDRESS:**

GREGORY S. LAMPERT  
CHRISTIE, PARKER & HALE, LLP  
PO BOX 29001  
GLENDALE, CA 91209-9001

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**APPLICANT:** Early Morning LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO :**

73780/W225

**CORRESPONDENT E-MAIL ADDRESS:**

[pto@cph.com](mailto:pto@cph.com)

**OFFICE ACTION**

**STRICT DEADLINE TO RESPOND TO THIS LETTER**

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS** OF THE ISSUE/MAILING DATE BELOW.

**ISSUE/MAILING DATE: 6/22/2014**

**THIS IS A FINAL ACTION.**

This Office action is in response to applicant's communication filed on May 29, 2014. The refusal based on Sections 1, 2, and 45 is maintained and made FINAL.

**REFUSAL – APPLIED-FOR MARK IS A VARIETAL NAME**

Registration is refused because the applied-for mark is a varietal name for the identified goods and as such, does not function as a trademark to indicate the source of applicant's goods and to identify and distinguish them from others. Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§1051-1052, 1127; *see* TMEP §1202.12. In the previous Office action, the examining attorney attached Internet evidence illustrating that LIVIN' EASY is the varietal/cultivar name for a rose. Also see the attached additional evidence that shows LIVIN' EASY is the varietal/cultivar name for a rose. The evidence consists of a plant cell report and a gardening website instructing one how to grow LIVIN' EASY roses. Both websites refer to LIVIN' EASY as the cultivar name for a rose.

Varietal or cultivar names are designations used to identify cultivated varieties or subspecies of live plants or agricultural seeds. TMEP §1202.12. They are generic and cannot be registered as trademarks because they are the common descriptive names of plants or seeds by which such varieties are known to the U.S. consumer. *Id.* Moreover, a consumer "has to have some common descriptive name he can use to indicate that he wants one [particular] variety of apple tree, rose, or whatever, as opposed to another, and it is the varietal name of the strain which naturally and commonly serves this purpose." *In re Pennington Seed, Inc.*, 466 F.3d 1053, 1057, 80 USPQ2d 1758, 1761 (Fed. Cir. 2006) (quoting *In re Hilltop Orchards & Nurseries, Inc.*, 206 USPQ 1034, 1036 (TTAB 1979)); *see In re Delta & Pine Land Co.*, 26 USPQ2d 1157, 1159 n.4 (TTAB 1993).

**Response to a Final Action**

Applicant must respond within six months of the date of issuance of this final Office action or the application will be abandoned. 15 U.S.C. §1062(b); 37 C.F.R. §2.65(a). Applicant may respond by providing one or both of the following:

- (1) A response that fully satisfies all outstanding requirements and/or resolves all outstanding refusals.
- (2) An appeal to the Trademark Trial and Appeal Board, with the appeal fee of \$100 per class.

37 C.F.R. §2.64(a); TMEP §714.04; *see* 37 C.F.R. §2.6(a)(18); TBMP ch. 1200.

In certain rare circumstances, an applicant may respond by filing a petition to the Director pursuant to 37 C.F.R. §2.63(b)(2) to review procedural issues. 37 C.F.R. §2.64(a); TMEP §714.04; *see* 37 C.F.R. §2.146(b); TBMP §1201.05; TMEP §1704 (explaining petitionable matters). The petition fee is \$100. 37

C.F.R. §2.6(a)(15).

/Cimmerian Coleman/  
U.S. Patent and Trademark Office  
Trademark Examining Attorney  
Law Office 102  
571.272.9146  
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**TO RESPOND TO THIS LETTER:** Go to [http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp). Please wait 48-72 hours from the issue/ mailing date before using the Trademark Electronic Application System (TEAS), to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail [TEAS@uspto.gov](mailto:TEAS@uspto.gov). For questions about the Office action itself, please contact the assigned trademark examining attorney. **E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.**

**All informal e-mail communications relevant to this application will be placed in the official application record.**

**WHO MUST SIGN THE RESPONSE:** It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

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Plant Cell Reports  
February 2007, Volume 26, Issue 2, pp 153-160

## 2,4,5-Trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar 'Livin' Easy' (*Rosa* sp.)

Tammy Estabrooks, Robin Browne, Zhongmin Dong

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### Abstract

Somatic embryogenesis (SE) offers vast potential for the clonal propagation of high-value roses. However, some recalcitrant cultivars unresponsive to commonly employed SE-inducing agents and low induction rates currently hinder the commercialization of SE technology in rose. Rose SE technology requires improvement before it can be implemented as a production system on a commercial scale. In the present work, we assessed 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), a synthetic auxin not previously tested in rose. In its effectiveness to induce SE in the rose cultivar 'Livin' Easy' (*Rosa*



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rose, for its effectiveness to induce SE in the rose cultivar 'L'vin' Easy' (*Rosa* sp.). We ran a parallel comparison to the commonly used 2,4-dichlorophenoxyacetic acid (2,4-D). We tested each auxin with two different basal media: Murashige and Skoog (MS) basal medium and woody plant medium (WPM). MS medium resulted in somatic embryo production, whereas WPM did not. 2,4,5-T induced SE over a greater concentration range than 2,4-D's and resulted in significantly greater embryo yields. 2,4,5-T at a concentration of 10 or 25  $\mu$ M was better for embryonic tissue initiation than 2,4,5-T at 5  $\mu$ M. Further embryo development occurred when the tissue was transferred to plant growth regulator (PGR) free medium or media with 40% the original auxin concentration. However, the PGR-free medium resulted in a high percentage of abnormal embryos (32.31%) compared to the media containing auxins. Upon transfer to germination medium, somatic embryos successfully converted into plantlets at rates ranging from 33.3 to 95.2%, depending on treatment. Survival rates 3 months *ex vitro* averaged 14.0 and 55.6% for 2,4-D- and 2,4,5-T-derived plantlets, respectively. Recurrent SE was observed in 60.2% of the plantlets growing on germination medium. This study is the first report of SE in the commercially valuable rose cultivar 'L'vin' Easy' (*Rosa* sp.) and a suitable methodology was developed for SE of this rose cultivar.



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Title	Topics	Authors
2,4,5-Trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar 'L'vin' Easy' ( <i>Rosa</i> sp.)	► Plant Biochemistry ► Biotechnology ► Plant Sciences ► Cell Biology	Tammy Estabrooks <sup>(1)</sup> Robin Browne <sup>(2)</sup> Zhongmin Dong <sup>(2)</sup>
Journal	Keywords	Author Affiliations
► Plant Cell Reports ► Volume 26, Issue 2, pp 153-160	Rosa Somatic embryogenesis	1. Department of Biology, Saint Mary's University, Halifax, Nova Scotia, B3H 3C3, Canada

Plant growth regulator  
Auxin

PlantSelect Biotechnology  
Systems Ltd., 101 Research Drive,  
Dartmouth, Nova Scotia, B2Y 4T6,  
Canada

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Rosa  
(Livin' Easy Rose)

'Livin' Easy' is a hardy hybrid tea rose producing high-centered, fully double, vermilion flowers with glossy, mid-green leaves. Also sold in plant nurseries as Beauty Star or Frystar rose. In general, roses are a large group of flowering shrubs, most with showy flowers that are single-petaled to fully double petaled. Leaves are typically medium to dark green, glossy, and ovate, with finely toothed edges. Vary in size from 1/2 inch to 6 inches, five petals to more than 30, and in nearly every color. Often the flowers are very fragrant. Most varieties grow on long canes that sometimes climb. Unfortunately, this favorite plant is quite susceptible to a variety of diseases and pests, many of which can be controlled with good cultural practices.

**Important Info** : Also sold in plant nurseries as Beauty Star or Frystar rose.

How to Grow this Plant:

Where can you buy this plant: [click here!](#)

Characteristics

- Cultivar: Livin' Easy
- Family: Rosaceae
- Size: Height: 5 ft. to 6 ft.  
Width: 2 ft. to 2.5 ft.
- Plant Category: edibles, perennials, shrubs,
- Plant Characteristics: edible flowers,
- Foliage Characteristics: deciduous,
- Foliage Color: green,
- Flower Characteristics: double, long lasting,
- Flower Color: reds,
- Tolerances: deer,

Requirements

- Bloomtime Range: Mid Spring to Mid Fall
- USDA Hardiness Zone: 5 to 9

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AHS Heat Zone: 3 to 9  
 Light Range: Sun to Full Sun  
 pH Range: 4.5 to 8  
 Soil Range: Sandy Loam to Clay Loam  
 Water Range: Normal to Moist

**Plant Care**

**Fertilizing**

**How-to : Fertilization for Established Plants**

Established plants can benefit from fertilization. Take a visual inventory of your landscape. Trees need to be fertilized every few years. Shrubs and other plants in the landscape can be fertilized yearly. A soil test can determine existing nutrient levels in the soil. If one or more nutrients is low, a specific instead of an all-purpose fertilizer may be required. Fertilizers that are high in N, nitrogen, will promote green leafy growth. Excess nitrogen in the soil can cause excessive vegetative growth on plants at the expense of flower bud development. It is best to avoid fertilizing late in the growing season. Applications made at that time can force lush, vegetative growth that will not have a chance to harden off before the onset of cold weather.

**Light**

**Conditions : Full Sun**

**Full Sun** is defined as exposure to more than 6 hours of continuous, direct sun per day.

**Watering**

**Conditions : Moist and Well Drained**

**Moist and well drained** means exactly what it sounds like. Soil is moist without being soggy because the texture of the soil allows excess moisture to drain away. Most plants like about 1 inch of water per week. Amending your soil with compost will help improve texture and water holding or draining capacity. A 3 inch layer of mulch will help to maintain soil moisture and studies have shown that mulched plants grow faster than non-mulched plants.

**Planting**

**How-to : Preparing Garden Beds**

Use a soil testing kit to determine the acidity or alkalinity of the soil before beginning any garden bed preparation. This will help you determine which plants are best suited for your site. Check soil drainage and correct drainage where standing water remains. Clear weeds and debris from planting areas and continue to remove weeds as soon as they come up.

A week to 10 days before planting, add 2 to 4 inches of aged manure or compost and work into the planting site to improve fertility and increase water retention and drainage. If soil composition is weak, a layer of topsoil should be considered as well. No matter if your soil is sand or clay, it can be improved by adding the same thing: organic matter. The more, the better; work deep into the soil. Prepare beds to an 18 inch deep for perennials. This will seem like a tremendous amount of work now, but will pay off later. Besides, this is not something that is

The sidebar contains the following elements from top to bottom:

- Two identical banners for Johns Hopkins University, each featuring the university's crest and name.
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but will greatly pay off later. Besides, this is not something that is easily done later, once plants have been established.

#### How-to : Pruning Flowering Shrubs

It is necessary to **prune your deciduous flowering shrub** for two reasons: 1. By removing old, damaged or dead wood, you increase air flow, yielding in less disease. 2. You rejuvenate new growth which increases flower production.

Pruning deciduous shrubs can be divided into 4 groups: Those that require **minimal pruning** (take out only dead, diseased, damaged, or crossed branches, can be done in early spring); **spring pruning** (encourages vigorous, new growth which produces summer flowers - in other words, flowers appear on new wood); **summer pruning after flower** (after flowering, cut back shoots, and take out some of the old growth, down to the ground); **suckering** (flowers appear on wood from previous year. Cut back flowered stems by 1/2, to strong growing new shoots and remove 1/2 of the flowered stems a couple of inches from the ground) Always remove dead, damaged or diseased wood first, no matter what type of pruning you are doing.

**Examples: Minimal:** Amelanchier, Aronia, Chimonanthus, Clethra, Cornus alternifolia, Daphne, Fothergilla, Hamamelis, Poncirus, Viburnum. **Spring:** Abelia, Buddleia, Dalura, Fuchsia, Hibiscus, Hypericum, Perovskia, Spirea douglasii/japonica, Tamarix. **Summer after flower:** Buddleia alternifolia, Calycanthus, Chaenomeles, Corylus, Cotoneaster, Deutzia, Forsythia, Magnolia x soulangeana/stellata, Philadelphus, Rhododendron sp., Ribes, Spirea x arguta/prunifolia/thunbergii, Syringa, Weigela. **Suckering:** Kerria

#### How-to : Planting Shrubs

Dig a hole twice the size of the root ball and deep enough to plant at the same level the shrub was in the container. If soil is poor, dig hole even wider and fill with a mixture half original soil and half compost or soil amendment.

Carefully remove shrub from container and gently separate roots. Position in center of hole, best side facing forward. Fill in with original soil or an amended mixture if needed as described above. For larger shrubs, build a water well. Finish by mulching and watering well.

If the plant is balled-and-burlapped, remove fasteners and fold back the top of natural burlap, tucking it down into hole, after you've positioned shrub. Make sure that all burlap is buried so that it won't wick water away from rootball during hot, dry periods. If synthetic burlap, remove if possible. If not possible, cut away or make slits to allow for roots to develop into the new soil. For larger shrubs, build a water well. Finish by mulching and watering well.

If shrub is bare-root, look for a discoloration somewhere near the base; this mark is likely where the soil line was. If soil is too sandy or too clayey, add organic matter. This will help with both drainage and water holding capacity. Fill soil, firming just enough to support shrub. Finish by mulching and watering well.

#### How-to : Planting Roses

Plant roses where they will receive full sun (at least 6 hours) and

Plant roses where they will receive full sun (at least 6 hours) and ample moisture and nutrients. Allow adequate spacing (3 to 6 feet apart depending on the climate) as good air circulation will inhibit foliar diseases. Before planting, soak bare root plants in water for several hours to ensure they are well hydrated. Select a soil site that is well drained. For clay soils amend the soil with organic matter or prepare raised beds. Dig a planting hole big enough to spread out the roots completely, once the center of plant has been set atop a mound. Fill hole with water before planting. Remove broken canes or roots and plant the bush so that the graft union (swollen knob from which the canes grow) is just above the soil level. Fill hole with amended soil and water well. Mound rich soil over the graft union to protect it from the sun. Remove this once leaves have appeared. Container grown roses can be planted almost anytime of year and would be done just as if planting a shrub.

**How-to : Planting Perennials**

Determine appropriate perennials for your garden by considering sun and shade through the day, exposure, water requirements, climate, soil makeup, seasonal color desired, and position of other garden plants and trees.

The best times to plant are spring and fall, when soil is workable and out of danger of frost. Fall plantings have the advantage that roots can develop and not have to compete with developing top growth as in the spring. Spring is more desirable for perennials that dislike wet conditions or for colder areas, allowing full establishment before first winter. Planting in summer or winter is not advisable for most plants, unless planting a more established sized plant.

**To plant container-grown plants:** Prepare planting holes with appropriate depth and space between. Water the plant thoroughly and let the excess water drain before carefully removing from the container. Carefully loosen the root ball and place the plant in the hole, working soil around the roots as you fill. If the plant is extremely root bound, separate roots with fingers. A few slits made with a pocket knife are okay, but should be kept to a minimum. Continue filling in soil and water thoroughly, protecting from direct sun until stable.

**To plant bare-root plants:** Plant as soon as possible after purchase. Prepare suitable planting holes, spread roots and work soil among roots as you fill in. Water well and protect from direct sun until stable.

**To plant seedlings:** A number of perennials produce self-sown seedlings that can be transplanted. You may also start your own seedling bed for transplanting. Prepare suitable planting holes, spacing appropriately for plant development. Gently lift the seedling and as much surrounding soil as possible with your garden trowel, and replant it immediately, firming soil with fingertips and water well. Shade from direct sun and water regularly until stable.

**Problems**

**Pest : Thrips**

Thrips are small, winged insects that attack many types of plants and thrive in hot, dry conditions (like heated houses). They can multiply quickly as a female can lay up to 300 eggs in a life span of 45 days without mating. Most of the damage to plants is caused by the young larvae which feed on tender leaf and flower tissue.

by the young larvae which feed on tender leaf and flower tissue. This leads to distorted growth, injured flower petals and premature flower drop. Thrips also can transmit many harmful plant viruses.

**Prevention and Control:** keep weeds down and use screening on windows to keep them out. Remove or discard infested plants, keep them away from non-infested plants. Trap with yellow sticky cards or take advantage of natural enemies such as predatory mites. Sometimes a good steady shower of water will wash them off the plant. Consult your local garden center professional or county Cooperative extension office for legal chemical recommendations.

**Pest : Spider Mites**

**Spider mites** are small, 8 legged, spider-like creatures which thrive in hot, dry conditions (like heated houses). Spider mites feed with piercing mouth parts, which cause plants to appear yellow and stippled. Leaf drop and plant death can occur with heavy infestations. Spider mites can multiply quickly, as a female can lay up to 200 eggs in a life span of 30 days. They also produce a web which can cover infested leaves and flowers.

**Prevention and Control:** Keep weeds down and remove infested plants. Dry air seems to worsen the problem, so make sure plants are regularly watered, especially those preferring high humidity such as tropicals, citrus, or tomatoes. Always check new plants prior to bringing them home from the garden center or nursery. Take advantage of natural enemies such as ladybug larvae. If a miticide is recommended by your local garden center professional or county Cooperative Extension office, read and follow all label directions. Concentrate your efforts on the undersides of the leaves as that is where spider mites generally live.

**Pest : Whiteflies**

**Whiteflies** are small, winged insects that look like tiny moths, which attack many types of plants. The flying adult stage prefers the underside of leaves to feed and breed. Whiteflies can multiply quickly as a female can lay up to 500 eggs in a life span of 2 months. If a plant is infested with whiteflies, you will see a cloud of fleeing insects when the plant is disturbed. Whiteflies can weaken a plant, eventually leading to plant death if they are not checked. They can transmit many harmful plant viruses. They also produce a sweet substance called honeydew (coveted by ants) which can lead to an unattractive black surface fungal growth called sooty mold.

**Possible controls:** keep weeds down; use screening in windows to keep them out; remove infested plants away from non-infested plants; use a reflective mulch (aluminum foil) under plants (this repels whiteflies); trap with yellow sticky cards; apply labeled pesticides; encourage natural enemies such as parasitic wasps in the garden; and sometimes a good steady shower of water will wash them off the plant.

**Pest : Aphids**

Aphids are small, soft-bodied, slow-moving insects that suck fluids from plants. **Aphids** come in many colors, ranging from green to brown to black, and they may have wings. They attack a wide range of plant species causing stunting, deformed leaves and buds. They can transmit harmful plant viruses with their piercing/sucking mouthparts. Aphids, generally, are merely a nuisance, since it

takes many of them to cause serious plant damage. However aphids do produce a sweet substance called honeydew (coveted by ants) which can lead to an unattractive black surface growth called sooty mold.

Aphids can increase quickly in numbers and each female can produce up to 250 live nymphs in the course of a month without mating. Aphids often appear when the environment changes - spring & fall. They're often massed at the tips of branches feeding on succulent tissue. Aphids are attracted to the color yellow and will often hitchhike on yellow clothing.

**Prevention and Control:** Keep weeds to an absolute minimum, especially around desirable plants. On edibles, wash off infected area of plant. Lady bugs and lacewings will feed on aphids in the garden. There are various products - organic and inorganic - that can be used to control aphids. Seek the recommendation of a professional and follow all label procedures to a tee.

**Fungi : Powdery Mildew**

**Powdery Mildew** is usually found on plants that do not have enough air circulation or adequate light. Problems are worse where nights are cool and days are warm and humid. The powdery white or gray fungus is usually found on the upper surface of leaves or fruit. Leaves will often turn yellow or brown, curl up, and drop off. New foliage emerges crinkled and distorted. Fruit will be dwarfed and often drops early.

**Prevention and Control:** Plant resistant varieties and space plants properly so they receive adequate light and air circulation. Always water from below, keeping water off the foliage. This is paramount for roses. Go easy on the nitrogen fertilizer. Apply fungicides according to label directions before problem becomes severe and follow directions exactly, not missing any required treatments. Sanitation is a must - clean up and remove all leaves, flowers, or debris in the fall and destroy.

**Pest : Caterpillars**

Caterpillars are the immature form of moths and butterflies. They are voracious feeders attacking a wide variety of plants. They can be highly destructive and are characterized as leaf feeders, stem borers, leaf rollers, cutworms and tent-formers.

**Prevention and Control:** keep weeds down, scout individual plants and remove caterpillars, apply labeled insecticides such as soaps and oils, take advantage of natural enemies such as parasitic wasps in the garden and use *Bacillus thuringiensis* (biological warfare) for some caterpillar species.

**Fungi : Black Spot**

A known rose disease, **Black Spot** appears on young leaves as irregular black circles, often having a yellow halo. Circles or spore colonies may grow to 1/2 inch in diameter. Leaves will turn yellow and drop off, only to produce more leaves that will follow the same pattern. Roses may not make it through the winter if black spot is severe. The fungus will also affect the size and quality of flowers.

**Prevention and Control:** Plant resistant varieties for your area. Always water from the ground, never overhead. Practice good

sanitation - clean up and destroy debris, especially around plants that have had a problem. When pruning roses, even deadheading, dip pruners in a bleach / water solution after each cut. If a plant seems to have chronic black spot, remove it. A 2-3 inch thick layer of mulch at the base of plant reduces splashing. Do not wait until black spot is a huge problem to control! Start early. Spray with a fungicide labeled for black spot on roses.

#### **Pest : Scale Insects**

Scales are insects, related to mealy bugs, that can be a problem on a wide variety of plants - indoor and outdoor. Young scales crawl until they find a good feeding site. The adult females then lose their legs and remain on a spot protected by its hard shell layer. They appear as bumps, often on the lower sides of leaves. They have piercing mouth parts that suck the sap out of plant tissue. Scales can weaken a plant leading to yellow foliage and leaf drop. They also produce a sweet substance called honeydew (coveted by ants) which can lead to an unattractive black surface fungal growth called sooty mold.

**Prevention and Control:** Once established they are hard to control. Isolate infested plants away from those that are not infested. Consult your local garden center professional or Cooperative Extension office in your county for a legal recommendation regarding their control. Encourage natural enemies such as parasitic wasps in the garden.

#### **Diseases : Blight**

Blight are cause by fungi or bacteria that kill plant tissue. Symptoms often show up as the rapid spotting or wilting of foliage. There are many different blights, specific to various plants, each requiring a varied method of control.

#### **Miscellaneous**

##### **Conditions : Deer Tolerant**

There are no plants that are 100% deer resistant, but many that are deer tolerant. There are plants that deer prefer over others. You will find that what deer will or will not eat varies in different parts of the country. A lot of it has to do with how hungry they are. Most deer will sample everything at least once, decide if they like it or not and return if favorable. A fence is the good deer barrier. You may go for a really tall one (7 to 8 feet), or try 2 parallel fences, (4 to 5 feet apart). Use a wire mesh fence rather than board, since deer are capable of wiggling through a 12 inch space.

#### **How-to : Cut Flowers**

Flowers suitable for cutting maintain their form for several days when properly conditioned and placed in water or soaked oasis. A cut flower should have a fairly strong, long stem, making it easy to work with in arrangements. There are many short stem flowers that make good cut flowers too, but they look best when floated in a bowl or clustered and placed in a juice glass size vase.

For best results, always cut flowers early in the morning, preferably before dew has had a chance to dry. Always make cuts with a sharp knife or pruners and plunge flowers or foliage into a bucket of water. Store in a cool place until you are ready to work with them, this will keep flowers from opening. Always re-cut stems and change water frequently. Washing vases or containers

to rid of existing bacteria helps increase their life, as well.

**Edibles : Edible Flowers**

Some flowers are **edible** or have edible portions that are not only beautiful, but nutritious and tasty. Buds, flowers, leaves, stems, and roots are selected from designated edible varieties. Plant as you would a regular flower, but use only organic practices. If you are not a total organic gardener, separate growing areas should be used for the growing of edible flowers.

When portions of edible flowers are desired, pull petals or edible portions from fresh flowers and snip off the petals from the base of the flower. Remember to always wash flowers thoroughly making certain any residue or dirt has been removed. Give them a gentle bath in water and then dip the petals in ice water to perk them up. Drain on paper towels. Petals and whole flowers may be stored for a short time in plastic bags in refrigeration. Freeze whole small flowers in ice rings or cubes. Make sure you know what the flower is **before** you eat it; have an accurate identification done.

**Glossary : Mass Planting**

Mass is one of the elements of design and relates directly to balance. Mass planting is defined as the grouping of three or more of the same type of plants in one area. When massing plants, keep in mind what visual effect they will have. Small properties require smaller masses where larger properties can handle larger masses or sweeps of plants.

**Glossary : Deciduous**

**Deciduous** refers to those plants that lose their leaves or needles at the end of the growing season.

**Glossary : Perennial**

**Perennial**: traditionally a non-woody plant that lives for two or more growing seasons.

**Glossary : Shrub**

**Shrub**: is a deciduous or evergreen woody perennial that has multiple branches that form near its base.

**Glossary : Fragrant**

**Fragrant**: having fragrance.

**Glossary : Plant Characteristics**

Plant characteristics define the plant, enabling a search that finds specific types of plants such as bulbs, trees, shrubs, grass, perennials, etc.

**Glossary : Flower Characteristics**

Flower characteristics can vary greatly and may help you decide on a "look or feel" for your garden. If you're looking for fragrance or large, showy flowers, click these boxes and possibilities that fit your cultural conditions will be shown. If you have no preference, leave boxes unchecked to return a greater number of possibilities.

**Glossary : Edibles**

An edible is a plant that has a part or all of it that can be safely consumed in some way.

**How-to : Getting the Most Out of Cut Flowers**

Cut flowers bring the garden into your home. While some cut flowers have a long vase life, most are highly perishable. How cut flowers are treated when you first bring them home can significantly increase how long they last.

The most important thing to consider is getting sufficient water taken up into the cut stem. Insufficient water can result in wilting and short-lived flowers. Bent neck of roses, where the flower head droops, is the result of poor water uptake. To maximize water uptake, first re-cut the stems at an angle so that the vascular system (the "plumbing" of the stem) is clear. Next immerse the cut stems in warm water.

Remember when the flower is cut, it is cut off from its food supply. Once water is taken care of, food is the resource that will run out next. The plants stems naturally feed the flowers with sugars. If you add a bit of sugar (1 tsp.) to the vase water, this will help feed the flower stems and extend their vase life.

Bacteria will build up in vase water and eventually clog up the stem so the flower cannot take up water. To prevent this, change the vase water frequently and make a new cut in the stems every few days.

Floral preservatives, available from florists, contain sugars, acids and bactericides that can extend cut flower life. These come in small packets and are generally available where cut flowers are sold. If used properly, these can extend the vase life of some cut flowers 2 to 3 times when compared with just plain water in the vase.

**How-to : Winter Protection for Roses**

F. Start off by keeping your plants healthy and vigorous going into the winter - continue to water them properly until the ground freezes. Stop feeding at least 6 weeks before the first frost date as this is the time to start hardening off the plants for the winter. In really cold climates, after a couple of hard freezes, mound soil or heavy mulch 1 foot over the base of plant to protect the graft union. Cut back long canes to 4 foot lengths and bind them together to prevent injury in the winter. Remove soil mounds after all danger of hard frost has passed in the spring.

In milder climates, this process is not necessary, but a good layer of mulch and continued watering up to frost and periodically through winter is a good idea. The best time to prune no matter where you live is at the end of the dormant season, when buds are beginning to swell.

**Glossary : Viruses**

**Viruses**, which are smaller than bacteria, are not living and do not replicate on their own. They must rely on the cellular mechanisms of their hosts to replicate. Because this greatly disrupts the cell's functionality, outward signs of a viral infection result in a plant disease with symptoms such as abnormal or stunted growth, damaged fruit, discolorations or spots.

**Prevention and Control:** Keep virus carriers such as aphids, leafhoppers, and thrips under control. These plant feeding insects spread viruses. Viruses can also be introduced by infected pollen or through plant openings (as when pruning). Begin by **keeping the pathogen out** of your garden. New plants should be checked, as well as tools and existing plants. Use only certified seed that is deemed disease-free. **Plant only resistant varieties** and create a **discouraging environment** by rotating crops, not planting closely related plants in the same area every year.

**Glossary : Growth Buds**

Plant stems contain numerous buds that will grow and renew a plant when stimulated by pruning. There are three basic types of buds: terminal, lateral and dormant. Terminal buds are at the tips of twigs or branches. They grow to make the branch or twig longer. In some cases they may give rise to a flower. If you cut the tip of a branch and remove the terminal bud, this will encourage the lateral buds to grow into side branches resulting in a thicker, bushier plant. Lateral buds are lower down on the twig and are often at the point of leaf attachment. Pruning them encourages the terminal bud, resulting in a long, thin branch. Dormant buds may remain inactive in the bark or stem and will only grow after the plant is cut back.

**Glossary : Fertilize**

Fertilize just before new growth begins with a complete fertilizer.

**Glossary : Pruning**

Now is the preferred time to prune this plant.

**Plant Images**

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**To:** Early Morning LLC ([pto@cph.com](mailto:pto@cph.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86098613 - LIVIN' EASY - 73780/W225  
**Sent:** 6/22/2014 9:10:45 PM  
**Sent As:** ECOM102@USPTO.GOV  
**Attachments:**

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**IMPORTANT NOTICE REGARDING YOUR  
U.S. TRADEMARK APPLICATION**

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED  
ON **6/22/2014** FOR U.S. APPLICATION SERIAL NO. 86098613

Please follow the instructions below:

**(1) TO READ THE LETTER:** Click on this [link](#) or go to <http://tsdr.uspto.gov>, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

**(2) TIMELY RESPONSE IS REQUIRED:** Please carefully review the Office action to determine (1) how to respond, and (2) the applicable response time period. Your response deadline will be calculated from **6/22/2014** (or sooner if specified in the Office action). For information regarding response time periods, see <http://www.uspto.gov/trademarks/process/status/responsetime.jsp>.

**Do NOT hit "Reply" to this e-mail notification, or otherwise e-mail your response** because the USPTO does NOT accept e-mails as responses to Office actions. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System (TEAS) response form located at [http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp).

**(3) QUESTIONS:** For questions about the contents of the Office action itself, please contact the assigned trademark examining attorney. For *technical* assistance in accessing or viewing the Office action in the Trademark Status and Document Retrieval (TSDR) system, please e-mail [TSDR@uspto.gov](mailto:TSDR@uspto.gov).

**WARNING**

**Failure to file the required response by the applicable response deadline will result in the**

**ABANDONMENT of your application.** For more information regarding abandonment, see <http://www.uspto.gov/trademarks/basics/abandon.jsp>.

**PRIVATE COMPANY SOLICITATIONS REGARDING YOUR APPLICATION:** Private companies **not** associated with the USPTO are using information provided in trademark applications to mail or e-mail trademark-related solicitations. These companies often use names that closely resemble the USPTO and their solicitations may look like an official government document. Many solicitations require that you pay “fees.”

Please carefully review all correspondence you receive regarding this application to make sure that you are responding to an official document from the USPTO rather than a private company solicitation. All official USPTO correspondence will be mailed only from the “United States Patent and Trademark Office” in Alexandria, VA; or sent by e-mail from the domain “@uspto.gov.” For more information on how to handle private company solicitations, see [http://www.uspto.gov/trademarks/solicitation\\_warnings.jsp](http://www.uspto.gov/trademarks/solicitation_warnings.jsp).

# **EXHIBIT 9**

**To:** Early Morning LLC ([pto@cph.com](mailto:pto@cph.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86098613 - LIVIN' EASY -  
73780/W225 - Request for Reconsideration Denied - Return to TTAB  
**Sent:** 2/3/2015 10:24:02 AM  
**Sent As:** ECOM102@USPTO.GOV  
**Attachments:**

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

U.S. APPLICATION SERIAL NO. 86098613

MARK: LIVIN' EASY

**\*86098613\***

**CORRESPONDENT ADDRESS:**

GARY J. NELSON  
CHRISTIE, PARKER & HALE, LLP  
PO BOX 29001  
GLENDALE, CA 91209-9001

GENERAL TRADEMARK INFORMATION  
<http://www.uspto.gov/trademarks/in>

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APPLICANT: Early Morning LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO :**

73780/W225

**CORRESPONDENT E-MAIL ADDRESS:**

[pto@cph.com](mailto:pto@cph.com)

**REQUEST FOR RECONSIDERATION DENIED**

ISSUE/MAILING DATE: 2/3/2015

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. *See* 37 C.F.R. §2.63(b)(3); TMEP §§715.03(a)(ii)(B), 715.04(a). The following requirement(s) and/or refusal(s) made final in the Office action dated June 22, 2014 are maintained and continue to be final: Applied-for mark is a varietal name and does not function as a trademark to indicate the source of applicant's goods. *See* TMEP §§715.03(a)(ii)(B), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issue(s), nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue(s) in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues. Based on the evidence of record, the applicant's applied-for mark is being used as a cultivar name for roses and applicant's description of goods is broad enough to include all types of roses.

Accordingly, the request is denied.

If applicant has already filed a timely notice of appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

If no appeal has been filed and time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to (1) comply with and/or overcome any outstanding final requirement(s) and/or refusal(s), and/or (2) file a notice of appeal to the Board. TMEP §715.03(a)(ii)(B); *see* 37 C.F.R. §2.63(b)(1)-(3). The filing of a request for reconsideration does not stay or extend the time for filing an appeal. 37 C.F.R. §2.63(b)(3); *see* TMEP §§715.03, 715.03(a)(ii)(B), (c).

/Cimmerian Coleman/  
U.S. Patent and Trademark Office  
Trademark Examining Attorney  
Law Office 102  
571.272.9146  
cimmerian.coleman@uspto.gov

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# **EXHIBIT 10**

**Colleen Toomey**

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**From:** Zhongmin Dong <Zhongmin.Dong@smu.ca>  
**Sent:** Monday, December 22, 2014 8:59 AM  
**To:** Gary Nelson  
**Subject:** Re: Inappropriate Use of LIVIN' EASY Trademark. CPH Ref. W225:73780.

Dear Mr. Nelson,

Your letter concerning the use of LIVIN EASY in one of our publication (Estabrooks, T., R. Browne, and Z. Dong. 2007. 2,4,5-trichlorophenoxyacetic acid promotes somatic embryogenesis in the rose cultivar 'Livin' Easy' (Rosa sp.). Plant Cell Reports. 26:153-160) was received today. Thank you for your information on the trademark and cultivar name. We will stop using LIVIN EASY trademark when referring to rose cultivar in the future.

Thanks,

Zhongmin Dong

# **EXHIBIT 11**

**Colleen Toomey**

---

**From:** Christie, Parker & Hale [info@cph.com]  
**Sent:** Thursday, January 15, 2015 10:25 AM  
**To:** FAX-GSL; FAX-GJN; Martha Sturdivan  
**Subject:** FW: ATTN: Gary Nelson Re : CPH Ref. W225:73780

-----Original Message-----

**From:** Robin Browne [mailto:robin.browne@acadiau.ca]  
**Sent:** Thursday, January 15, 2015 10:24 AM  
**To:** Christie, Parker & Hale [info@cph.com]  
**Subject:** ATTN: Gary Nelson Re : CPH Ref. W225:73780

Dear Mr Nelson

I received your letter yesterday concerning the inappropriate use of the LIVIN' EASY trademark for the Weeks Roses variety. I am certainly willing to comply with your request. We were not aware of the mistake in utilization of the varietal name. Be assured there has not been any further research done with this variety or any intention to do so in the future. Do you require a formal written confirmation from all authors ? I have spoken with Professor Dong concerning this matter, and he confirms the same willingness to comply. Note that Tammy Estabrooks no longer resides in New Zealand. If you wish to communicate directly with her, I could provide the appropriate contact information.

Please advise further regarding our compliance.

Respectfully yours

Robin Browne, Ph.D.  
Acadia University

# **EXHIBIT 12**

**Colleen Toomey**

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**From:** Christie, Parker & Hale [info@cph.com]  
**Sent:** Monday, December 22, 2014 7:36 AM  
**To:** FAX-GSL; FAX-GJN; Martha Sturdivan  
**Subject:** FW: Inappropriate Use of LIVIN' EASY Trademark CPH Ref. W225:73780 B ATT: Gary Nelson

**From:** Backyardgardener, LLC [mailto:duncan@backyardgardener.com]  
**Sent:** Saturday, December 20, 2014 8:41 PM  
**To:** Christie, Parker & Hale [info@cph.com]  
**Subject:** Inappropriate Use of LIVIN' EASY Trademark CPH Ref. W225:73780 B ATT: Gary Nelson

Page was revised as directed on 12/20/14 upon receipt of the USPS mail on 12/20/2014.

Your page may required recache to see the revision.

Duncan McAlpine  
Backyardgardener, LLC

# **EXHIBIT 13**

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## Google Plant Images

### Rosa ( Fellowship Rose )

'Fellowship' is a floribunda rose producing well-spaced clusters of cupped, double, scented, deep orange flowers with abundant glossy, mid-green leaves. Also sold in plant nurseries as Harwelcome or Livin' Easy rose. In general, roses are a large group of flowering shrubs, most with showy flowers that are single-petaled to fully double petalled. Leaves are typically medium to dark green, glossy, and ovate, with finely toothed edges. Vary in size from 1/2 inch to 6 inches, five petals to more than 30, and in nearly every color. Often the flowers are very fragrant. Most varieties grow on long canes that sometimes dimb. Unfortunately, this favorite plant is quite susceptible to a variety of diseases and pests, many of which can be controlled with good cultural practices.

**Important Info :** Also sold in plant nurseries as Harwelcome or Livin' Easy rose.

#### How to Grow this Plant:

Where can you buy this plant: [click here!](#)

#### Characteristics

Cultivar: Fellowship

Family: Rosaceae

Size: Height: 0 ft. to 3 ft.  
Width: 0 ft. to 2 ft.

Plant Category: edibles, ground covers, perennials, shrubs,

Plant Characteristics: edible flowers,

Foliage Characteristics: deciduous,

Foliage Color: green,

Flower Characteristics: double, fragrant, long lasting,

Flower Color: oranges,

Tolerances: deer,

#### Requirements

Bloomtime Range: Mid Spring to Mid Fall

USDA Hardiness Zone: 5 to 9

AHS Heat Zone: 3 to 9

Light Range: Sun to Full Sun

pH Range: 4.5 to 8

Soil Range: Sandy Loam to Clay Loam

Water Range: Normal to Moist

#### Plant Care

#### Fertilizing

##### How-to : Fertilization for Young Plants

Young plants need extra phosphorus to encourage good root development. Look for a fertilizer that has phosphorus, P, in it (the second number on the bag.) Apply recommended amount for plant per label directions in the soil at time of planting or at least during the first growing season.

##### How-to : Fertilization for Established Plants

Established plants can benefit from fertilization. Take a visual inventory of your landscape. Trees need to be fertilized every few years. Shrubs and other plants in the landscape can be fertilized yearly. A soil test can determine existing nutrient levels in the soil. If one or more nutrients is low, a specific instead of an all-purpose fertilizer may be required. Fertilizers that are high in N, nitrogen, will promote

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green leafy growth. Excess nitrogen in the soil can cause excessive vegetative growth on plants at the expense of flower bud development. It is best to avoid fertilizing late in the growing season. Applications made at that time can force lush, vegetative growth that will not have a chance to harden off before the onset of cold weather.

#### How-to : Fertilization for Annuals and Perennials

Annuals and perennials may be fertilized using: 1. water-soluble, quick release fertilizers; 2. temperature controlled slow-release fertilizers; or 3. organic fertilizers such as fish emulsion. Water soluble fertilizers are generally used every two weeks during the growing season or per label instructions. Controlled, slow-release fertilizers are worked into the soil usually only once during the growing season or per label directions. For organic fertilizers such as fish emulsion, follow label directions as they may vary per product.

#### Light

##### Conditions : Sun

**Sun** is defined as the continuous, direct, exposure to 6 hours (or more) of sunlight per day.

##### Conditions : Light Conditions

Unless a site is completely exposed, light conditions will change during the day and even during the year. The northern and eastern sides of a house receive the least amount of light, with the northern exposure being the shadiest. The western and southern sides of a house receive the most light and are considered the hottest exposures due to intense afternoon sun.

You will notice that sun and shade patterns change during the day. The western side of a house may even be shady due to shadows cast by large trees or a structure from an adjacent property. If you have just bought a new home or just beginning to garden in your older home, take time to map sun and shade throughout the day. You will get a more accurate feel for your site's true light conditions.

##### Conditions : Light and Plant Selection

For best plant performance, it is desirable to match the correct plant with the available light conditions. Right plant, right place! Plants which do not receive sufficient light may become pale in color, have fewer leaves and a "leggy" stretched-out appearance. Also expect plants to grow slower and have fewer blooms when light is less than desirable. It is possible to provide supplemental lighting for indoor plants with lamps. Plants can also receive too much light. If a shade loving plant is exposed to direct sun, it may wilt and/or cause leaves to be sunburned or otherwise damaged.

##### Conditions : Full Sun

**Full Sun** is defined as exposure to more than 6 hours of continuous, direct sun per day.

#### Watering

##### Conditions : Moist and Well Drained

**Moist and well drained** means exactly what it sounds like. Soil is moist without being soggy because the texture of the soil allows excess moisture to drain away. Most plants like about 1 inch of water per week. Amending your soil with compost will help improve texture and water holding or draining capacity. A 3 inch layer of mulch will help to maintain soil moisture and studies have shown that mulched plants grow faster than non-mulched plants.

#### Planting

##### How-to : Preparing Garden Beds

Use a soil testing kit to determine the acidity or alkalinity of the soil before beginning any garden bed preparation. This will help you determine which plants are best suited for your site. Check soil drainage and correct drainage where standing water remains. Clear weeds and debris from planting areas and continue to remove weeds as soon as they come up.

A week to 10 days before planting, add 2 to 4 inches of aged manure or compost and work into the planting site to improve fertility and increase water retention and drainage. If soil composition is weak, a layer of topsoil should be considered as well. No matter if your soil is sand or clay, it can be improved by adding the same thing: organic matter. The more, the better; work deep into the soil. Prepare beds to an 18 inch deep for perennials. This will seem like a tremendous amount of work now, but will greatly pay off later. Besides, this is not something that is easily done later, once plants have been established.

##### How-to : Pruning Flowering Shrubs

It is necessary to **prune your deciduous flowering shrub** for two reasons: 1. By removing old, damaged or dead wood, you increase air flow, yielding in less disease. 2. You rejuvenate new growth which increases flower production.

Pruning deciduous shrubs can be divided into 4 groups: Those that require **minimal pruning** (take out only dead, diseased, damaged, or crossed branches, can be done in early spring.); **spring pruning** (encourages vigorous, new growth which produces summer flowers - in other words, flowers appear on new wood); **summer pruning after flower** (after flowering, cut back shoots, and take out some of the old growth, down to the ground); **suckering habit pruning** (flowers appear on wood from previous year. Cut back flowered stems by 1/2, to strong growing new shoots and remove 1/2 of the flowered stems a couple of inches from

the ground) Always remove dead, damaged or diseased wood first, no matter what type of pruning you are doing.

**Examples:** *Minimal:* Amelanchier, Aronia, Chimonanthus, Clethra, Cornus alternifolia, Daphne, Fothergilla, Hamamelis, Poncirus, Viburnum. *Spring:* Abelia, Buddleia, Datura, Fuchsia, Hibiscus, Hypericum, Perovskia, Spirea douglasii/japonica, Tamarix. *Summer after flower:* Buddleia alternifolia, Calycanthus, Chaenomeles, Corylus, Cotoneaster, Deutzia, Forsythia, Magnolia x soulangeana/stellata, Philadelphus, Rhododendron sp., Ribes, Spirea x arguta/prunifolia/thunbergii, Syringa, Weigela. *Suckering:* Kerria

#### How-to : Planting Shrubs

Dig a hole twice the size of the root ball and deep enough to plant at the same level the shrub was in the container. If soil is poor, dig hole even wider and fill with a mixture half original soil and half compost or soil amendment.

Carefully remove shrub from container and gently separate roots. Position in center of hole, best side facing forward. Fill in with original soil or an amended mixture if needed as described above. For larger shrubs, build a water well. Finish by mulching and watering well.

If the plant is balled-and-burlapped, remove fasteners and fold back the top of natural burlap, tucking it down into hole, after you've positioned shrub. Make sure that all burlap is buried so that it won't wick water away from rootball during hot, dry periods. If synthetic burlap, remove if possible. If not possible, cut away or make slits to allow for roots to develop into the new soil. For larger shrubs, build a water well. Finish by mulching and watering well.

If shrub is bare-root, look for a discoloration somewhere near the base; this mark is likely where the soil line was. If soil is too sandy or too clayey, add organic matter. This will help with both drainage and water holding capacity. Fill soil, firming just enough to support shrub. Finish by mulching and watering well.

#### How-to : Planting Roses

Plant roses where they will receive full sun (at least 6 hours) and ample moisture and nutrients. Allow adequate spacing (3 to 6 feet apart depending on the climate) as good air circulation will inhibit foliar diseases. Before planting, soak bare root plants in water for several hours to ensure they are well hydrated. Select a soil site that is well drained. For clay soils amend the soil with organic matter or prepare raised beds. Dig a planting hole big enough to spread out the roots completely, once the center of plant has been set atop a mound. Fill hole with water before planting. Remove broken canes or roots and plant the bush so that the graft union (swollen knob from which the canes grow) is just above the soil level. Fill hole with amended soil and water well. Mound rich soil over the graft union to protect it from the sun. Remove this once leaves have appeared. Container grown roses can be planted almost anytime of year and would be done just as if planting a shrub.

#### How-to : Planting Perennials

Determine appropriate perennials for your garden by considering sun and shade through the day, exposure, water requirements, climate, soil makeup, seasonal color desired, and position of other garden plants and trees.

The best times to plant are spring and fall, when soil is workable and out of danger of frost. Fall plantings have the advantage that roots can develop and not have to compete with developing top growth as in the spring. Spring is more desirable for perennials that dislike wet conditions or for colder areas, allowing full establishment before first winter. Planting in summer or winter is not advisable for most plants, unless planting a more established sized plant.

**To plant container-grown plants:** Prepare planting holes with appropriate depth and space between. Water the plant thoroughly and let the excess water drain before carefully removing from the container. Carefully loosen the root ball and place the plant in the hole, working soil around the roots as you fill. If the plant is extremely root bound, separate roots with fingers. A few slits made with a pocket knife are okay, but should be kept to a minimum. Continue filling in soil and water thoroughly, protecting from direct sun until stable.

**To plant bare-root plants:** Plant as soon as possible after purchase. Prepare suitable planting holes, spread roots and work soil among roots as you fill in. Water well and protect from direct sun until stable.

**To plant seedlings:** A number of perennials produce self-sown seedlings that can be transplanted. You may also start your own seedling bed for transplanting. Prepare suitable planting holes, spacing appropriately for plant development. Gently lift the seedling and as much surrounding soil as possible with your garden trowel, and replant it immediately, firming soil with fingertips and water well. Shade from direct sun and water regularly until stable.

#### Problems

##### Pest : Thrips

**Thrips** are small, winged insects that attack many types of plants and thrive in hot, dry conditions (like heated houses). They can multiply quickly as a female can lay up to 300 eggs in a life span of 45 days without mating. Most of the damage to plants is caused by the young larvae which feed on tender leaf and flower tissue. This leads to distorted growth, injured flower petals and premature flower drop. Thrips also can transmit many harmful plant viruses.

**Prevention and Control:** Keep weeds down and use screening on windows to keep them out. Remove or discard infested plants, keep them away from non-infested plants. Trap with yellow sticky cards or take advantage of natural enemies such as predatory mites. Sometimes a good steady shower of water will wash them off the plant. Consult your local garden center professional or county Cooperative

extension office for legal chemical recommendations.

#### **Pest : Spider Mites**

**Spider mites** are small, 8 legged, spider-like creatures which thrive in hot, dry conditions (like heated houses). Spider mites feed with piercing mouth parts, which cause plants to appear yellow and stippled. Leaf drop and plant death can occur with heavy infestations. Spider mites can multiply quickly, as a female can lay up to 200 eggs in a life span of 30 days. They also produce a web which can cover infested leaves and flowers.

**Prevention and Control:** Keep weeds down and remove infested plants. Dry air seems to worsen the problem, so make sure plants are regularly watered, especially those preferring high humidity such as tropicals, citrus, or tomatoes. Always check new plants prior to bringing them home from the garden center or nursery. Take advantage of natural enemies such as ladybug larvae. If a miticide is recommended by your local garden center professional or county Cooperative Extension office, read and follow all label directions. Concentrate your efforts on the undersides of the leaves as that is where spider mites generally live.

#### **Pest : Whiteflies**

**Whiteflies** are small, winged insects that look like tiny moths, which attack many types of plants. The flying adult stage prefers the underside of leaves to feed and breed. Whiteflies can multiply quickly as a female can lay up to 500 eggs in a life span of 2 months. If a plant is infested with whiteflies, you will see a cloud of fleeing insects when the plant is disturbed. Whiteflies can weaken a plant, eventually leading to plant death if they are not checked. They can transmit many harmful plant viruses. They also produce a sweet substance called honeydew (coveted by ants) which can lead to an unattractive black surface fungal growth called sooty mold.

**Possible controls:** keep weeds down; use screening in windows to keep them out; remove infested plants away from non-infested plants; use a reflective mulch (aluminum foil) under plants (this repels whiteflies); trap with yellow sticky cards, apply labeled pesticides; encourage natural enemies such as parasitic wasps in the garden; and sometimes a good steady shower of water will wash them off the plant.

#### **Pest : Aphids**

Aphids are small, soft-bodied, slow-moving insects that suck fluids from plants. **Aphids** come in many colors, ranging from green to brown to black, and they may have wings. They attack a wide range of plant species causing stunting, deformed leaves and buds. They can transmit harmful plant viruses with their piercing/sucking mouthparts. Aphids, generally, are merely a nuisance, since it takes many of them to cause serious plant damage. However aphids do produce a sweet substance called honeydew (coveted by ants) which can lead to an unattractive black surface growth called sooty mold.

Aphids can increase quickly in numbers and each female can produce up to 250 live nymphs in the course of a month without mating. Aphids often appear when the environment changes - spring & fall. They're often massed at the tips of branches feeding on succulent tissue. Aphids are attracted to the color yellow and will often hitchhike on yellow clothing.

**Prevention and Control:** Keep weeds to an absolute minimum, especially around desirable plants. On edibles, wash off infected area of plant. Lady bugs and lacewings will feed on aphids in the garden. There are various products - organic and inorganic - that can be used to control aphids. Seek the recommendation of a professional and follow all label procedures to a tee.

#### **Fungi : Powdery Mildew**

**Powdery Mildew** is usually found on plants that do not have enough air circulation or adequate light. Problems are worse where nights are cool and days are warm and humid. The powdery white or gray fungus is usually found on the upper surface of leaves or fruit. Leaves will often turn yellow or brown, curl up, and drop off. New foliage emerges crinkled and distorted. Fruit will be dwarfed and often drops early.

**Prevention and Control:** Plant resistant varieties and space plants properly so they receive adequate light and air circulation. Always water from below, keeping water off the foliage. This is paramount for roses. Go easy on the nitrogen fertilizer. Apply fungicides according to label directions before problem becomes severe and follow directions exactly, not missing any required treatments. Sanitation is a must - clean up and remove all leaves, flowers, or debris in the fall and destroy.

#### **Pest : Caterpillars**

Caterpillars are the immature form of moths and butterflies. They are voracious feeders attacking a wide variety of plants. They can be highly destructive and are characterized as leaf feeders, stem borers, leaf rollers, cutworms and tent-formers.

**Prevention and Control:** keep weeds down, scout individual plants and remove caterpillars, apply labeled insecticides such as soaps and oils, take advantage of natural enemies such as parasitic wasps in the garden and use *Bacillus thuringiensis* (biological warfare) for some caterpillar species.

#### **Fungi : Black Spot**

A known rose disease, **Black Spot** appears on young leaves as irregular black circles, often having a yellow halo. Circles or spore colonies may grow to 1/2 inch in diameter. Leaves will turn yellow and drop off, only to produce more leaves that will follow the same pattern. Roses may not make it through the winter if black spot is severe. The fungus will also affect the size and quality of flowers.

**Prevention and Control:** Plant resistant varieties for your area. Always water from the ground, never overhead. Practice good sanitation - clean up and destroy debris, especially around plants that have had a problem. When pruning roses, even deadheading, dip pruners in a bleach / water solution after each cut. If a plant seems to have chronic black spot, remove it. A 2-3 inch thick layer of mulch at the base of plant reduces splashing. Do not wait until black spot is a huge problem to control! Start early. Spray with a fungicide labeled for black spot on roses.

#### **Pest : Scale Insects**

Scales are insects, related to mealy bugs, that can be a problem on a wide variety of plants - indoor and outdoor. Young scales crawl until they find a good feeding site. The adult females then lose their legs and remain on a spot protected by its hard shell layer. They appear as bumps, often on the lower sides of leaves. They have piercing mouth parts that suck the sap out of plant tissue. Scales can weaken a plant leading to yellow foliage and leaf drop. They also produce a sweet substance called honeydew (coveted by ants) which can lead to an unattractive black surface fungal growth called sooty mold.

**Prevention and Control:** Once established they are hard to control. Isolate infested plants away from those that are not infested. Consult your local garden center professional or Cooperative Extension office in your county for a legal recommendation regarding their control. Encourage natural enemies such as parasitic wasps in the garden.

#### **Diseases : Blight**

Blights are caused by fungi or bacteria that kill plant tissue. Symptoms often show up as the rapid spotting or wilting of foliage. There are many different blights, specific to various plants, each requiring a varied method of control.

#### **Miscellaneous**

##### **Conditions : Deer Tolerant**

There are no plants that are 100% **deer resistant**, but many that are deer tolerant. There are plants that deer prefer over others. You will find that what deer will or will not eat varies in different parts of the country. A lot of it has to do with how hungry they are. Most deer will sample everything at least once, decide if they like it or not and return if favorable. A fence is the good deer barrier. You may go for a really tall one (7 to 8 feet), or try 2 parallel fences, (4 to 5 feet apart). Use a wire mesh fence rather than board, since deer are capable of wiggling through a 12 inch space.

##### **How-to : Cut Flowers**

Flowers suitable for cutting maintain their form for several days when properly conditioned and placed in water or soaked oasis. A cut flower should have a fairly strong, long stem, making it easy to work with in arrangements. There are many short stem flowers that make good cut flowers too, but they look best when floated in a bowl or clustered and placed in a juice glass size vase.

For best results, always cut flowers early in the morning, preferably before dew has had a chance to dry. Always make cuts with a sharp knife or pruners and plunge flowers or foliage into a bucket of water. Store in a cool place until you are ready to work with them, this will keep flowers from opening. Always re-cut stems and change water frequently. Washing vases or containers to rid of existing bacteria helps increase their life, as well.

##### **Edibles : Edible Flowers**

Some flowers are **edible** or have edible portions that are not only beautiful, but nutritious and tasty. Buds, flowers, leaves, stems, and roots are selected from designated edible varieties. Plant as you would a regular flower, but use only organic practices. If you are not a total organic gardener, separate growing areas should be used for the growing of edible flowers.

When portions of edible flowers are desired, pull petals or edible portions from fresh flowers and snip off the petals from the base of the flower. Remember to always wash flowers thoroughly making certain any residue or dirt has been removed. Give them a gentle bath in water and then dip the petals in ice water to perk them up. Drain on paper towels. Petals and whole flowers may be stored for a short time in plastic bags in refrigeration. Freeze whole small flowers in ice rings or cubes. Make sure you know what the flower is **before** you eat it; have an accurate identification done.

##### **Glossary : Mass Planting**

Mass is one of the elements of design and relates directly to balance. Mass planting is defined as the grouping of three or more of the same type of plants in one area. When massing plants, keep in mind what visual effect they will have. Small properties require smaller masses where larger properties can handle larger masses or sweeps of plants.

##### **Glossary : Deciduous**

**Deciduous** refers to those plants that lose their leaves or needles at the end of the growing season.

##### **Glossary : Perennial**

**Perennial:** traditionally a non-woody plant that lives for two or more growing seasons.

##### **Glossary : Shrub**

**Shrub:** is a deciduous or evergreen woody perennial that has multiple branches that form near its base.

#### Glossary : Fragrant

**Fragrant:** having fragrance.

#### Glossary : Plant Characteristics

Plant characteristics define the plant, enabling a search that finds specific types of plants such as bulbs, trees, shrubs, grass, perennials, etc.

#### Glossary : Flower Characteristics

Flower characteristics can vary greatly and may help you decide on a "look or feel" for your garden. If you're looking for fragrance or large, showy flowers, click these boxes and possibilities that fit your cultural conditions will be shown. If you have no preference, leave boxes unchecked to return a greater number of possibilities.

#### Glossary : Landscape Uses

By searching Landscape Uses, you will be able to pinpoint plants that are best suited for particular uses such as trellises, border plantings, or foundations.

#### Glossary : Edibles

An edible is a plant that has a part or all of it that can be safely consumed in some way.

#### How-to : Getting the Most Out of Cut Flowers

Cut flowers bring the garden into your home. While some cut flowers have a long vase life, most are highly perishable. How cut flowers are treated when you first bring them home can significantly increase how long they last.

The most important thing to consider is getting sufficient water taken up into the cut stem. Insufficient water can result in wilting and short-lived flowers. Bent neck of roses, where the flower head droops, is the result of poor water uptake. To maximize water uptake, first re-cut the stems at an angle so that the vascular system (the "plumbing" of the stem) is clear. Next immerse the cut stems in warm water.

Remember when the flower is cut, it is cut off from its food supply. Once water is taken care of, food is the resource that will run out next. The plants stems naturally feed the flowers with sugars. If you add a bit of sugar (1 tsp.) to the vase water, this will help feed the flower stems and extend their vase life.

Bacteria will build up in vase water and eventually clog up the stem so the flower cannot take up water. To prevent this, change the vase water frequently and make a new cut in the stems every few days.

Floral preservatives, available from florists, contain sugars, acids and bacteriacides that can extend cut flower life. These come in small packets and are generally available where cut flowers are sold. If used properly, these can extend the vase life of some cut flowers 2 to 3 times when compared with just plain water in the vase.

#### How-to : Winter Protection for Roses

F. Start off by keeping your plants healthy and vigorous going into the winter - continue to water them properly until the ground freezes. Stop feeding at least 6 weeks before the first frost date as this is the time to start hardening off the plants for the winter. In really cold climates, after a couple of hard freezes, mound soil or heavy mulch 1 foot over the base of plant to protect the graft union. Cut back long canes to 4 foot lengths and bind them together to prevent injury in the winter. Remove soil mounds after all danger of hard frost has passed in the spring.

In milder climates, this process is not necessary, but a good layer of mulch and continued watering up to frost and periodically through winter is a good idea. The best time to prune no matter where you live is at the end of the dormant season, when buds are beginning to swell.

#### Glossary : Viruses

**Viruses**, which are smaller than bacteria, are not living and do not replicate on their own. They must rely on the cellular mechanisms of their hosts to replicate. Because this greatly disrupts the cell's functionality, outward signs of a viral infection result in a plant disease with symptoms such as abnormal or stunted growth, damaged fruit, discolorations or spots.

**Prevention and Control:** Keep virus carriers such as aphids, leafhoppers, and thrips under control. These plant feeding insects spread viruses. Viruses can also be introduced by infected pollen or through plant openings (as when pruning). Begin by **keeping the pathogen out** of your garden. New plants should be checked, as well as tools and existing plants. Use only certified seed that is deemed disease-free. **Plant only resistant varieties** and **create a discouraging environment** by rotating crops, not planting closely related plants in the same area every year.

#### Glossary : Growth Buds

Plant stems contain numerous buds that will grow and renew a plant when stimulated by pruning. There are three basic types of buds: terminal, lateral and dormant. Terminal buds are at the tips of twigs or branches. They grow to make the branch or twig longer. In some cases they may give rise to a flower. If you cut the tip of a branch and remove the terminal bud, this will encourage the lateral buds to grow into side branches resulting in a thicker, bushier plant. Lateral buds are lower down on the twig and are often at the point of leaf attachment. Pruning

them encourages the terminal bud, resulting in a long, thin branch. Dormant buds may remain inactive in the bark or stem and will only grow after the plant is cut back.

**Glossary : Ground Cover**

**Ground cover** is any low growing plant that is planted in a mass to cover the ground. Shrubs, vines, perennials, and annuals can all be considered ground covers if they are grouped in this fashion. Ground covers can beautify an area, help reduce soil erosion, and the need to weed.

**Glossary : Fertilize**

Fertilize just before new growth begins with a complete fertilizer.

**Glossary : Pruning**

Now is the preferred time to prune this plant.

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