

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

THE PROCTER & GAMBLE
COMPANY,

Plaintiff,

v.

BLUE CROSS LABORATORIES,

Defendant.

Civil File No. **1:08 CV 018**
BECKWITH J. BLACK

COMPLAINT

FILED
JAMES BONINI
CLERK
08 JAN - 7 AM 10:13

Plaintiff The Procter & Gamble Company ("P&G"), for its Complaint against defendant
Blue Cross Laboratories, alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. P&G is an Ohio corporation with its principal place of business in Cincinnati, Ohio.
2. Defendant Blue Cross Laboratories ("Blue Cross") is a California corporation with its principal place of business in Santa Clarita, California.
3. This is a civil action arising from defendant's misuse of P&G's trademarks and trade dress. The claims alleged in this Complaint arise under the Lanham Act, 15 U.S.C. § 1051, et seq. and the Ohio Deceptive Trade Practices Act, Ohio Rev. Stat. Ann. § 4165.02.
4. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338, and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over claims under Ohio law. In addition, because the matter in controversy exceeds \$75,000, exclusive of interest and costs, and is between a citizen of a state and a citizen of another state, this Court also has jurisdiction under 28 U.S.C. § 1332.

5. This Court has personal jurisdiction over defendant by virtue of its commission of tortious acts within the state of Ohio and this District, its transaction of business within the State of Ohio and this District, and its contracts to supply goods in the State of Ohio and this District. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c).

BACKGROUND

6. Established in 1837, P&G began as a small, family-operated soap and candle company in Cincinnati, Ohio. Today, P&G markets several hundred products to more than five billion consumers in some 140 countries, and the P&G community consists of over 100,000 employees working in almost 80 countries worldwide.

7. P&G is one of the largest and most highly regarded manufacturers and sellers of consumer goods in the United States, with a long history of selling high quality products. P&G's product line includes a wide array of products that are purchased by hundreds of millions of American consumers each year.

8. P&G manufactures and markets a variety of personal care products, including hair care products such as shampoo and conditioning products. P&G devotes substantial effort, time, and resources to designing its packaging and graphics for such products. Packaging and graphics are important elements in marketing such products, because they serve both to distinguish the product from others and to represent and convey a product's quality and value to consumers.

P&G'S INTELLECTUAL PROPERTY RIGHTS

9. In November 2001, P&G acquired the company Clairol, Inc., including the HERBAL ESSENCES brands of hair care products and all intellectual property and goodwill associated with the products. Since that time P&G has marketed a variety of personal care products under the trademarks HERBAL ESSENCES and FRUIT FUSIONS, including hair care products. HERBAL ESSENCES products are widely distributed and available in all leading

channels of trade for personal care products, including supermarkets, pharmacies, and mass merchandise stores.

10. P&G is the owner of federal trademark Registration No. 2,784,672 for the FRUIT FUSIONS trademark. For a number of years, the FRUIT FUSIONS trademark has been a strong trademark symbolizing great consumer goodwill.

11. In 2006, P&G introduced a new line of HERBAL ESSENCES hair care products, featuring a unique and distinctive trade dress shown on Exhibit A attached hereto (the “HERBAL ESSENCES Trade Dress”). Large amounts of time and money were expended by P&G in designing the HERBAL ESSENCES Trade Dress specifically so that products featuring the HERBAL ESSENCES Trade Dress would be readily distinguishable by consumers from competing products on store shelves.

12. The HERBAL ESSENCES Trade Dress is unique and distinctive and consists of, among other elements, (a) a bottle with a sinuous shape featuring unexpected and asymmetrical curves; (b) the product brand name on the front label in white printing; (c) a holograph device or metallic printing on the top portion of a label; (c) a circular medallion device on the bottom portion of a label; and (d) a vinelike or organic device on the top portion of the label.

13. The distinctiveness and appeal of the HERBAL ESSENCES Trade Dress has resulted in substantial industry recognition. The industry publication CPC Packaging, for example, named the HERBAL ESSENCES Trade Dress a winner of its 2007 Editor’s Choice Awards.

14. The distinctive features included in the P&G Trade Dress serve the purpose of identifying and distinguishing the HERBAL ESSENCES line of personal care products from the products of other sellers.

15. As a result of the extensive sales and marketing of products packaged in the HERBAL ESSENCES Trade Dress, consumers already associate such trade dress with P&G and view that trade dress as designating the source of P&G's HERBAL ESSENCES line of products. The HERBAL ESSENCES Trade Dress is also an inherently distinctive symbol of great consumer goodwill.

BLUE CROSS'S HISTORY OF INFRINGEMENT

16. Like P&G, Blue Cross markets a variety of personal care products. Rather than developing its own product line through its own marketing and creative efforts, however, Blue Cross bases a substantial component of its business on imitations of P&G's products. Blue Cross has sold its products in packaging that copies most or all of the key elements of P&G's packaging so as to convey an overall impression of the same or a closely related product. Blue Cross has repeatedly, deliberately, and willfully violated P&G's trademark and trade dress rights on a range of personal care products, using trademarks and trade dress so as to cause a likelihood of confusion among consumers and the trade. P&G has been forced to take legal action twice previously against Blue Cross to protect P&G's intellectual property rights.

P&G'S PREVIOUS ACTIONS AGAINST BLUE CROSS

17. In 1997, in response to Blue Cross's marketing of a product copying P&G's PERT PLUS trademark and trade dress, P&G filed an action against Blue Cross in the Southern District of Florida. In a March 24, 1998, Final Judgment and Order of Permanent Injunction on Consent, Blue Cross admitted that it infringed P&G's PERT PLUS trademark and trade dress and agreed to cease the use of its infringing packaging, along with any other packaging that was likely to cause confusion as to source or origin with P&G's then-current PERT PLUS trade dress.

18. In 2004, in response to Blue Cross's marketing of products infringing upon several of P&G's trademarks and trade dress including PANTENE, NOXZEMA, PERT PLUS, HEAD & SHOULDERS, SECRET, and notably, HERBAL ESSENCES FRUIT FUSIONS, P&G filed a second action against Blue Cross in the Southern District of Ohio. In January 2005, Blue Cross admitted through a Final Judgment By Consent that the P&G trademark and trade dress rights alleged in the action, including the HERBAL ESSENCES trade dress and FRUIT FUSIONS trademark, were valid and enforceable and agreed to cease the use of its infringing packaging, along with any other packaging that was likely to cause confusion as to source or origin with P&G's then-current trade dress.

**BLUE CROSS'S CONTINUED INFRINGEMENT OF P&G'S HERBAL
ESSENCES TRADEMARKS AND TRADE DRESS**

19. Even though P&G has twice been forced to bring legal action against Blue Cross, and even though Blue Cross in both cases admitted to infringement, including infringement of P&G's HERBAL ESSENCES then-existing trade dress, Blue Cross has copied P&G's HERBAL ESSENCES Trade Dress yet again. In response to P&G's introduction of its new line-up of HERBAL ESSENCES shampoos and conditioners in 2006 featuring evolved and distinctive Herbal Essences Trade Dress, and fully aware of P&G's trademarks and HERBAL ESSENCES Trade Dress, Blue Cross began selling shampoo and conditioner products labeled HERBAL PASSION, intended to mimic P&G's HERBAL ESSENCES Trade Dress. Blue Cross's HERBAL PASSION products have been marketed and sold under the packaging shown on Exhibit B attached hereto.

20. Blue Cross's packaging is intentionally confusingly similar to the Herbal Essences Trade Dress, as is illustrated in the comparative packaging depicted here and also attached as Exhibit C hereto:



21. Defendant's HERBAL PASSION packaging infringes at least the distinctive elements in the P&G Trade Dress listed in paragraph 12.

22. In addition, Blue Cross uses the trademark FRUIT FUSION on its Herbal Passion rich volumizing shampoo product even though FRUIT FUSIONS is a registered P&G trademark

and even though Blue Cross was permanently restrained and enjoined from using any trademark that is confusingly similar to P&G's FRUIT FUSIONS trademark as part of the 2005 Final Judgment by Consent.

23. Before filing this action, P&G notified Blue Cross that the HERBAL PASSION packaging was infringing upon P&G's HERBAL ESSENCES Trade Dress.

24. In response, Blue Cross, through its counsel, represented that it had "ceased shipping the product," that a recall of the product was complete, and that it would supply additional information about its distribution of the infringing product.

25. Despite Blue Cross's representations, P&G has learned that Blue Cross's HERBAL PASSION shampoo and conditioner products bearing the infringing packaging continue to be sold at, among other outlets, Dollar Tree stores in Ohio. In addition, P&G has learned that at least one on-line distributor of Blue Cross products, known as Concord a/k/a The Better Choice Enterprises, Inc., continues to offer Blue Cross's HERBAL PASSION products on a website accessible throughout the United States, including Ohio. In addition, despite Blue Cross's representations, and despite repeated requests from P&G, it has failed to supply the information it committed to provide.

26. Blue Cross's actions have been willful, intentional, and deliberate, conducted with the intention of trading on the goodwill and reputation of P&G.

27. Blue Cross's actions have had and will continue to have a substantial and adverse impact upon interstate commerce.

FIRST CLAIM FOR RELIEF
Federal Unfair Competition (Trade Dress)
Lanham Act § 43(a), 15 U.S.C. § 1125(a)

28. P&G restates and realleges paragraphs 1 through 27.

29. P&G is the owner of trade dress rights in the packaging of its HERBAL ESSENCES product line.

30. Blue Cross's use of P&G's HERBAL ESSENCES Trade Dress on its HERBAL PASSIONS product line is likely to cause confusion, or to cause mistake, or to deceive as to affiliation, connection, or association of defendant with P&G, or as to the origin, sponsorship, or approval of defendant's goods, services, or commercial activities by P&G. Among other types of confusion created by defendant, its actions create initial interest confusion on the part of consumers. Such actions constitute unfair competition, false designation of origin, and palming off in violation of the Lanham Act § 43(a), 15 U.S.C. § 1125(a).

31. Blue Cross's actions have caused, and will continue to cause, irreparable harm to P&G unless permanently enjoined.

32. Blue Cross has profited from its infringement of P&G's trade dress and trademark rights and will continue to profit from it.. Blue Cross's actions are causing and will cause P&G monetary damage in amounts presently unknown but to be determined at trial.

**SECOND CLAIM FOR RELIEF
Federal Trademark Infringement
Lanham Act § 32, 15 U.S.C. § 1114**

33. P&G restates and realleges paragraphs 1 through 32.

34. P&G is the owner of the registered trademarks HERBAL ESSENCES and FRUIT FUSIONS.

35. Blue Cross's use of the FRUIT FUSION trademark is likely to cause confusion, or to cause mistake or to deceive, and it constitutes trademark infringement under the Lanham Act § 32, 15 U.S.C. § 1114.

36. Blue Cross's infringement has caused, and will continue to cause, irreparable harm to P&G unless permanently enjoined.

37. Blue Cross has profited from its infringement of P&G's trade dress and trademark rights and will continue to profit from it. Blue Cross's actions are causing and will cause P&G monetary damage in amounts presently unknown but to be determined at trial.

THIRD CLAIM FOR RELIEF
Violation of Ohio Deceptive Trade Practices Act

38. P&G restates and realleges paragraphs 1 through 37.

39. Blue Cross's actions in Ohio constitute willful and knowing deceptive trade practices in violation of Ohio Rev. Stat. § 4165.02(A)(2),(3).

40. Blue Cross's actions in Ohio have caused, and will continue to cause, irreparable harm to P&G unless permanently enjoined.

41. Blue Cross has profited from its infringement of P&G's trade dress and trademark rights in Ohio and will continue to profit from it. Blue Cross's actions are causing and will cause P&G monetary damage in amounts presently unknown but to be determined at trial.

42. Blue Cross has willfully engaged in the deceptive trade practices described above, knowing its actions to be deceptive.

PRAYER FOR RELIEF

WHEREFORE, plaintiff The Procter & Gamble Company requests that the Court enter judgment:

- (a) In favor of P&G and against defendant on all P&G's claims;
- (b) Preliminarily and permanently enjoining and restraining Blue Cross, its officers, agents, subsidiaries, servants, partners, employees, attorneys and all others in active concert or participation with it, from the manufacture, distribution, offering for sale, sale, advertising and/or promotion in the United States of personal care products packaged in trade dress that is confusingly similar to P&G's HERBAL ESSENCES Trade Dress or other P&G personal care

products, including but not limited to any products with the trade dress depicted in Exhibit B hereto;

(c) Requiring Blue Cross to deliver up for destruction all labels, signs, prints, packaging, wrappers, and advertising or promotional materials in its possession or within its custody or control and any screens, films, software, files, molds, and any other items tangible or intangible used to produce such materials that bear any trade dress, package design, or designation in violation of P&G's rights;

(d) Requiring Defendant to notify its customers in writing that they are not to sell products bearing the HERBAL ESSENCES Trade Dress and that said customers are to impound or return all such products to Blue Cross;

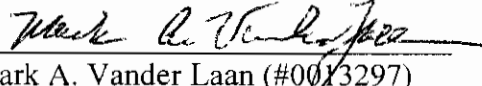
(e) Requiring defendant to account for and pay over to P&G defendant's profits and all damages sustained by P&G;

(f) Increasing the amount of damages and/or profits awarded P&G as appropriate pursuant to 15 U.S.C. § 1117(a);

(g) Awarding P&G reasonable attorney fees, costs, expenses, and interest pursuant to 15 U.S.C. § 1117(a) and other applicable law, including Ohio Rev. Stat. § 4165.03(A)(2)(B); and

(h) Awarding P&G such other relief as the Court may deem just and proper.

Dated: January 7, 2008

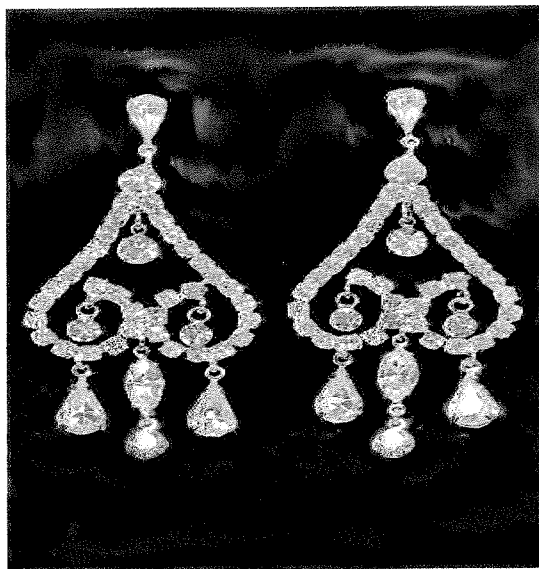
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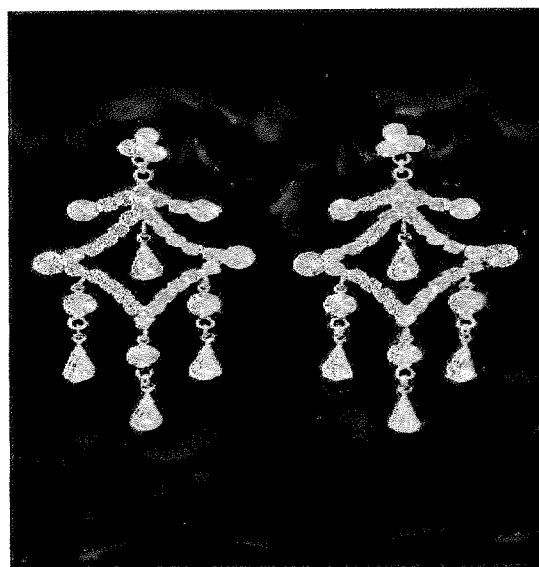
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EXHIBIT A

Glamour Goddess Jewelely

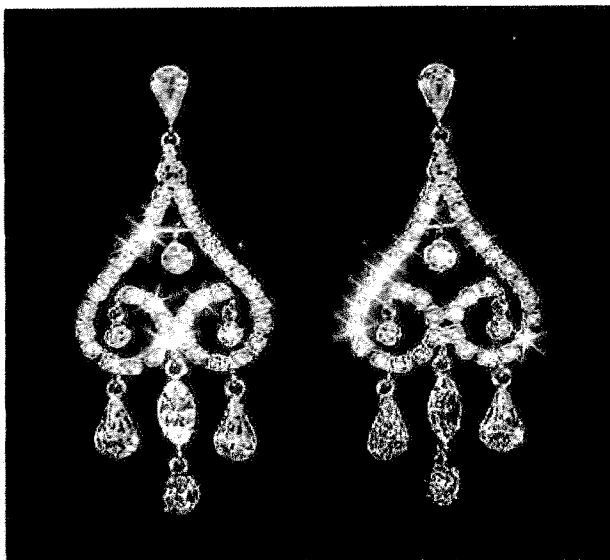


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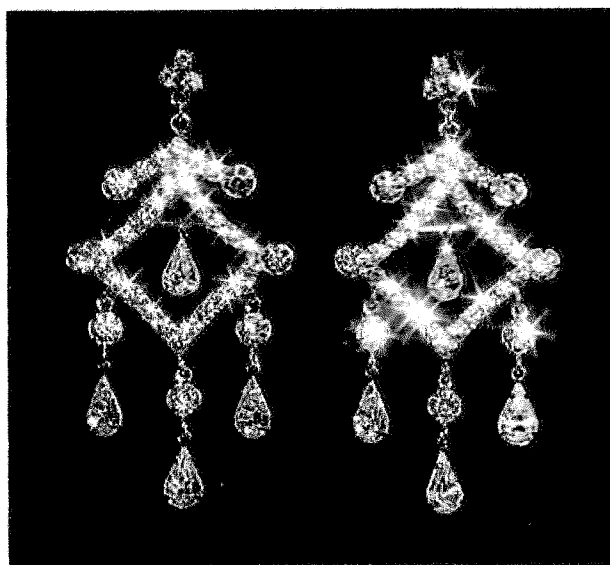


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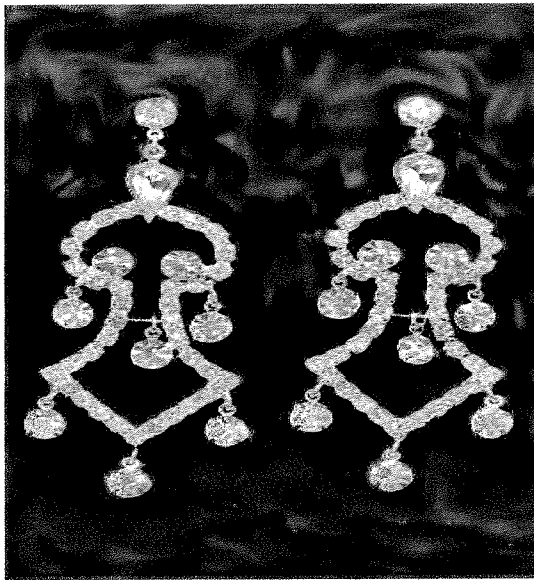
RhineStone Jewelry



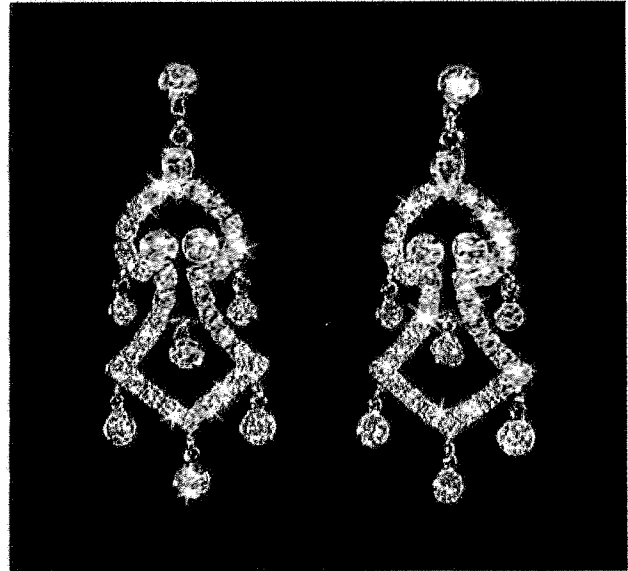
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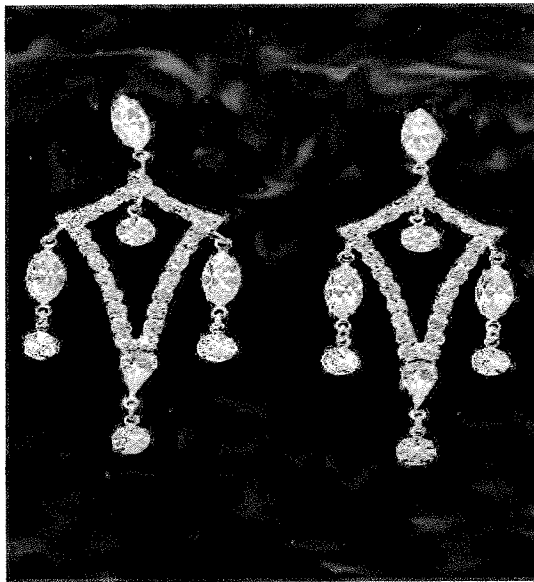
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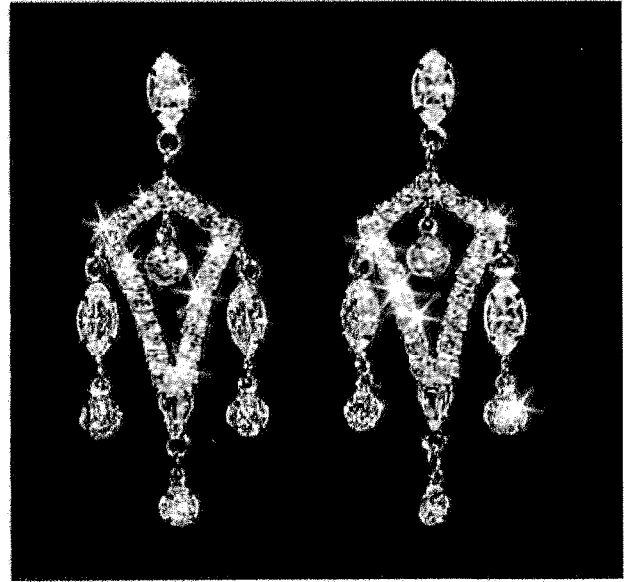
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ER029CS



12323



ER033CS



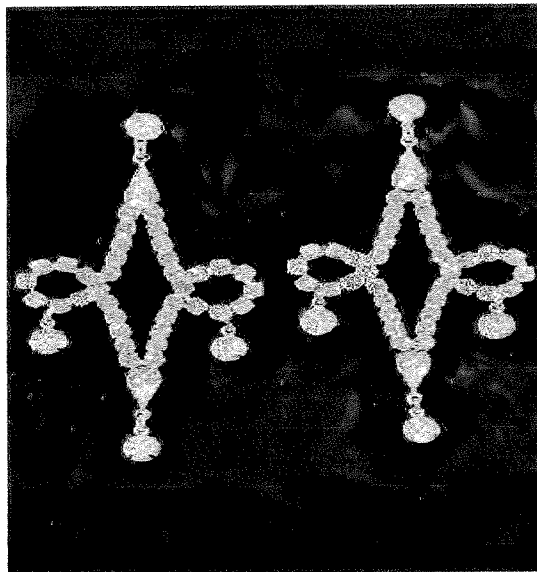
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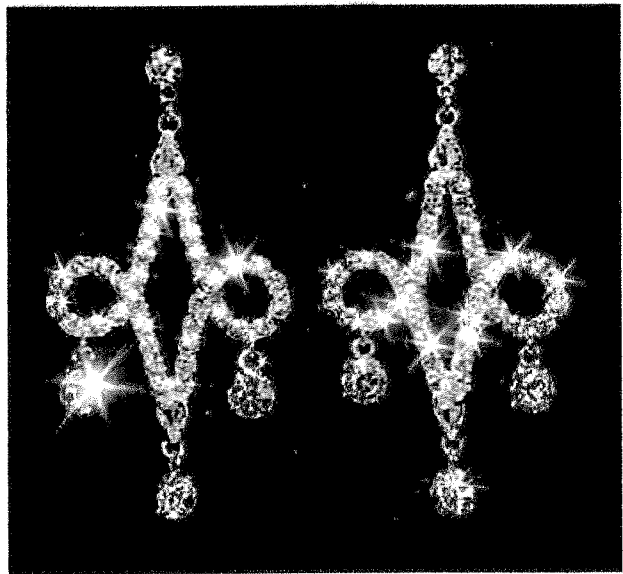
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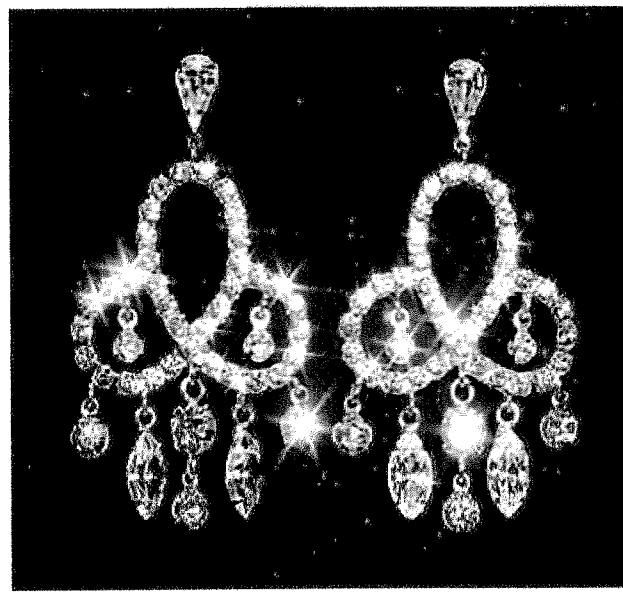
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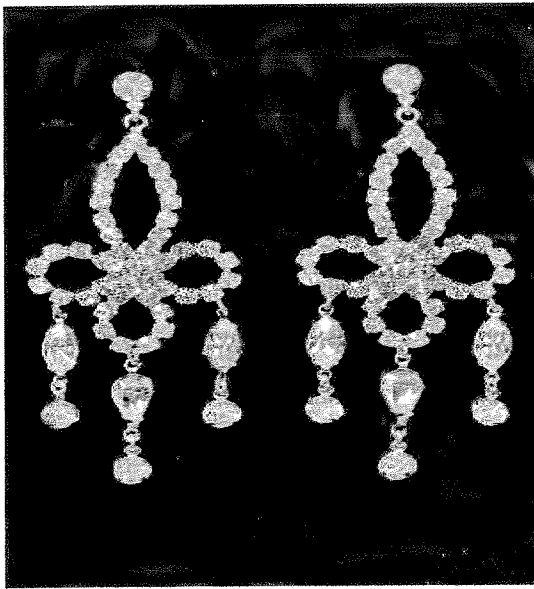
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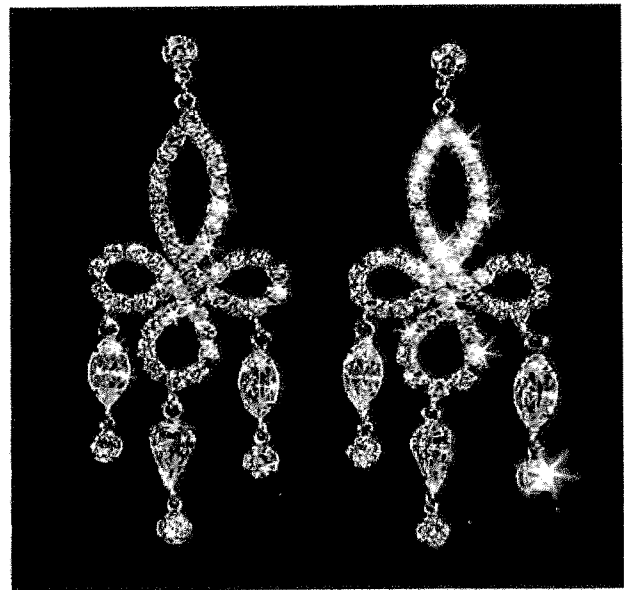
ER045CS



12326



ER061CS



12321

Glamour Goddess #	Glamour Goddess Price	Rhinestone #	Rhinestone Price
BA427CS	\$2.33	#12084	\$2.80
BA439CS	\$1.95	#12083	\$2.20
BA429CS	\$3.42	#6279	\$3.45
BA445CS	\$3.57	#6438	\$3.65
BA437CS	\$3.75	#12708	\$3.90
BA441CS	\$4.00	#12707	\$4.00
BA443CS	\$4.13	#13620	\$4.25
BA449CS	\$4.81	#12235 (smaller)	\$5.30
BA459CS	\$4.73	#11649	\$7.75
BA467CS	\$4.29	#12157	\$5.80
HC351CS	\$3.57	#12697	\$3.65
HC357CS	\$1.95	#12699	\$2.55
BR201CS	\$3.15	#11113S	\$3.60
BR203CS	\$10.69	#13267XS	\$12.25
BR209CS	\$3.15	#13621	\$3.45
BR213CS	\$14.82	#13268XS	\$17.50
BR207CS	\$6.50	#13282	\$8.25
BR215CS	\$4.42	#11949XS	\$5.00
BR225CS	\$7.46	#12162	\$12.25
ER001CS	\$6.73	#12327	\$6.85
ER003CS	\$4.99	#5365	\$5.00
ER019CS	\$5.74	#13238	\$5.75
ER021CS	\$4.28	#12344	\$6.65
ER025CS	\$4.42	#12330	\$4.45
ER029CS	\$4.62	#12323	\$4.65
ER033CS	\$5.58	#12325	\$5.65
ER037CS	\$7.50	#12324	\$7.50
ER041CS	\$5.60	#12322	\$5.65
ER043CS	\$4.84	#12592	\$5.15
ER045CS	\$6.02	#12326	\$6.10
ER061CS	\$6.79	#12321	\$6.85
ER063CS	\$6.42	#10011	\$8.50
ER065CS	\$9.41	#10001	\$11.50
ER069CS	\$6.45	#12350	\$6.95
ER075CS	\$9.10	#12591	\$9.25
ER083CS	\$8.13	#13106	\$8.50
ER085CS	\$4.28	#12348	\$4.80
HD723CS	\$15.60	#12190	\$17.00
HD724CS	\$15.75	#12734	\$17.50
HD729CS	\$3.45	#11247	\$6.40
HD751CS	\$6.79	#12194	\$7.75
NS606CS	\$8.47	#12924	\$10.00
NS607CS	\$4.51	#12874	\$9.25

NS608CS	\$12.69	#12859	\$14.75
NS624CS	\$13	#12869	\$14.25
NS652CS	\$7.13	#12444	\$10.00
NL169CS	\$15.54	#12218	\$20.25
PT497CS	\$6.73	#11572	\$7.00
PT505CS	\$4.99	#11154	\$5.00
PT513CS	\$6.50	#11574	\$6.50
PT529CS	\$7.41	#11573	\$7.75
PT537CS	\$3.94	#7583	\$4.15