

1 Manufactured devices that initially passed quality control tests subsequently suffered from
2 downward “drift” in BAC calculations. At first, Breathometer attempted to correct this problem
3 by having the app multiply the BAC sensed by the device by a certain amount (such as 1.2)
4 prior to sending the calculated BAC to the user’s smartphone. Experiments the company
5 conducted between January and March 2015 revealed that, in addition to being sensitive to
6 humidity and temperature, the Breeze sensors deteriorated significantly over time. For
7 example, one set of devices accurately estimated a BAC of 0.080% in January 2015, but
8 calculated a BAC of 0.060% under the same test conditions in March 2015. The company had
9 no reliable means of recalibrating Breeze products in the field.
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11 15. In the third quarter of 2015, the company notified its retail partners that it would
12 no longer sell Breeze. Breathometer did not, however, effectively notify its retailers about the
13 known problems with accuracy of Breeze readings. Nor did it notify its customers. Breeze
14 remained available for purchase from retailers such as Amazon.com and BestBuy.com as late as
15 February 2, 2016. After the FTC began its investigation and at the urging of FTC staff,
16 Breathometer sent letters to its retailers in May 2016, and emails to registered Breeze users in
17 June 2016, warning them of accuracy problems. Breathometer always had the ability to contact
18 registered users through the app or by email, and to update or disable its app in order to prevent
19 its use by consumers. Nevertheless, the app remained active until October 6, 2016, when the
20 company disabled the breathalyzer feature of its app for both Breeze and Original and replaced
21 it with a notice to consumers.
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24 **DEFENDANTS’ ADVERTISING AND MARKETING**

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Blow into the illuminated opening on the device to obtain your blood alcohol level. No mouthpiece required.

Make a smart decision.

The Breathometer app provides more than just your current blood alcohol levelt allows you to make more informed decisions: access to local cab services and provide guidance on when you will "Back to Zero™" - or likely sober.

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1 Breathometer—the smart breathalyzer—transforms your smartphone into
2 a breathalyzer in seconds — obtain your current blood alcohol level by
3 simply blowing into the device, learn how long before you are “back to
4 zero,” or you can call a local cab directly from the app. Breathometer
5 gives you the power to make smarter decisions when drinking. Drink
6 smart. Be safe.

7 ***

8 Just blow.

9 Blow into the illuminated opening for a few
10 seconds and see your results appear on screen.

11 ***

12 Make a smart decision.

13 Now that you know your blood alcohol level,
14 make a smart decision. The Breathometer app
15 provides Back to Zero guidance for how long
16 until you’ll likely be sober, and even gives you
17 the option to instantly call a local cab.

18 Superior Accuracy

19 FDA registered device. Detects alcohol levels
20 from 0.00– 0.20% BAC. Sensor accuracy +/-
21 0.01 @ 0.02 % BAC Please don’t drink and
22 drive.

23 November 2013 February 2016

24 C. Exhibit C, Excerpt from FAQs on Company Website:

25 How do I know Original Breathometer is accurate?

26 The Original Breathometer is an FDA registered device that has
27 undergone rigorous government lab grade testing to ensure its accuracy.

28 <http://support.breathometer.com/customer/portal/articles/1371460faq-s>, May 19, 2016

1 D. Exhibit D, Original Product Package:

2 Breathometer

3 The Smartphone Breathalyzer

4 ***

5 Shareable

6 Breathometer is designed so you can share it with your friends. No
7 accessories or tubes needed for safe, sterile, accurate use.

8 ***

9 Superior Accuracy

10 FDA registered device. Detects alcohol levels from ~~0.20~~ 0.20 % BAC.
11 Please don't drink and drive.

12 ***

13 BreathometerTM gives you the power to make smarter decisions when out
14 with friends. Transform your phone into a smart breathalyzer.

15 Original purchased by FTC, February 2, 2016

16 Breathometer Breeze

17 E. Exhibit E, Excerpts from Breeze Product Description on Amazon.com
18 website:

19 Breathometer Breeze the Wearable & Wireless
20 Smartphone Breathalyzer

21 ***

22 Product Description

23 Wirelessly transform your smartphone into a breathalyzer in seconds with
24 this wearable product that fits anywhere. The next generation Law
25 enforcement grade sensor provides accurate results in seconds. Simply
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1 rigorous government lab grade testing to ensure its accuracy. We provide
2 clear guidance in the mobile app and instruction manual to ensure that the
3 Breathometer is utilized correctly. Nothing replaces common sense and
4 you should never drink and drive.
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6 <http://support.breathometer.com/customer/portal/articles/1>

7 371460faq-s, May 19, 2016

8 G. Exhibit G, Breeze Product Package:

9 **BreathometerTM**
10 **BreezeTM**
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12 The wireless smartphone breathalyzer

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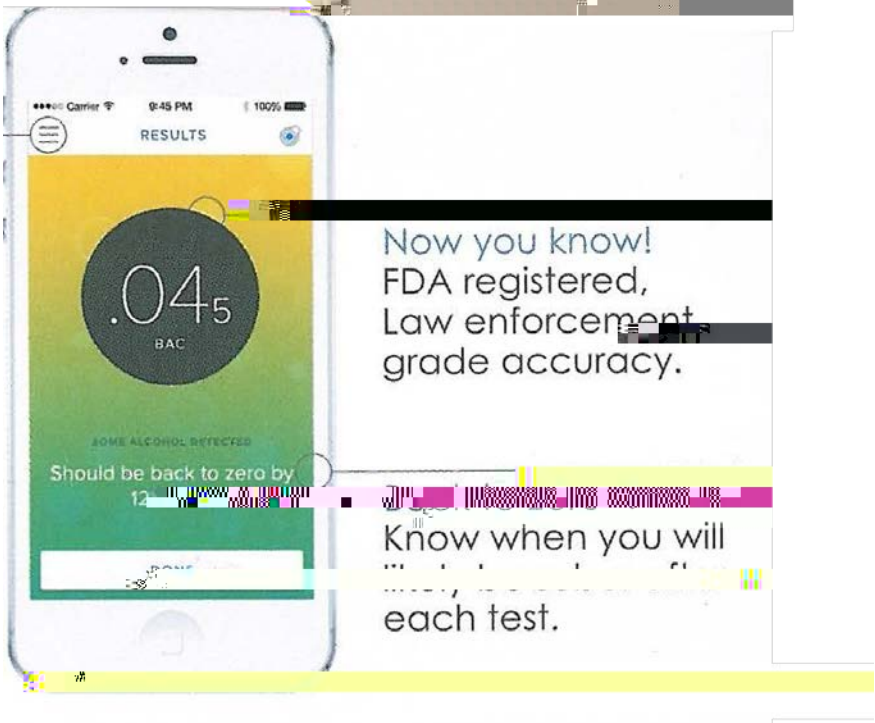
14
15 Bluetooth LE BAC Detection Syncs with App

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18 Just blow:
19 Blow through the mouthpiece to
20 reveal your current condition on
21 your smartphone.

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FDA Registered product. Detects alcohol levels from 0.000-0.250% BAC.

Breeze purchased by FTC, February

DEFENDANTS' VIOLATIONS OF THE FTC ACT

17. Section 5(a) of the FTC Act, 15 U.S.C. 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.”

18. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

19. Section 12 (a) of the FTC Act, 15 U.S.C. § 52(a), prohibits the dissemination of any false advertisement in or affecting commerce for the purpose of inducing, or which is likely to induce, the purchase of food, drugs, devices, services, or cosmetics. For the purposes of Section 12 of the FTC Act, Breathometer Original and Breeze are “devices” as defined in Section 15(d) of the FTC Act, 15 U.S.C. § 55(d).

20. Pursuant to Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), acts or practices are unfair under Section 5(a) if they cause or are likely to cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition.

Count I: False or Unsubstantiated Claims

21. Through the means described in Paragraph 16, Defendants represented, expressly or by implication, that:

A. Breathometer Original accurately detects a consumer's BAC from 0.00% to 0.20%

B. Breathometer Original accurately detects a consumer's BAC for the purpose of complying with impaired driving laws.

C. Breathometer Original is as accurate as other high breathalyzers.

D. Breathometer Breeze is a law enforcement grade breathalyzer that accurately detects a consumer's BAC from 0.000% to 0.250%.

1 Complaint constitutes a deceptive act or practice and the making of false advertisements, in or
2 affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a)
3 and 52.

4
5 Count III: Unfair Practices

6 27. As described in Paragraphs 14 and 15, Defendants were aware, by at least March 2015,
7 that Breeze devices produced inaccurate BAC readings. However, they failed to notify
8 consumers that the devices were inaccurate and to understate the users' BAC until June
9 2016, and failed to disable the Breathometer app's breathalyzer function until October 6, 2016.

10 28. Defendants' failure to take appropriate action after learning that the Breeze device posed
11 an ongoing public health and safety risk caused or was likely to cause substantial injury to
12 consumers, including consumers who relied on Breeze BAC readings after drinking alcohol, as
13 well as their passengers, pedestrians, and occupants of other vehicles on the road.

14 29. Consumers could not have reasonably avoided this likelihood of substantial injury
15 because they could not have reasonably have known that the Breeze devices were inaccurate.

16 30. The likelihood of substantial injury suffered by consumers is not outweighed by
17 countervailing benefits to consumers or competition.

18 31. Therefore, Defendants' practices as described in Paragraphs 14, 15, and 27 of this
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1 are likely to continue to injure consumers, repeat unjust enrichment, and harm the public
2 interest.

3 THIS COURT'S POWER TO GRANT RELIEF

4 33. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant
5 injunctive and such other relief as the Court may deem appropriate to halt and redress violations
6 of any provision of law enforced by the FTC. The Court, in the exercise of its equitable
7 jurisdiction, may award ancillary relief, including rescission or reformation of contracts,
8 restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and
9 remedy any violation of any provision of law enforced by the FTC.
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11 PRAYER FOR RELIEF

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1 Respectfully submitted,

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Dated: January 23, 2017

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