

1 DAVID C. SHONKA
Acting General Counsel

2 JANET M. EVANS (DC Bar No. 358467)
3 ELIZABETH JONES SANGER (WI Bar No. 1080449)
4 Federal Trade Commission
600 Pennsylvania Avenue, NW
5 Mail Drop CC-10528
Washington, DC 20580
6 (202) 326-2125, -2757 (Tel.)
7 (202) 326-3259 (Fax)
jevans@ftc.gov; esanger@ftc.gov

8 Attorneys for Plaintiff
9 FEDERAL TRADE COMMISSION

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 FEDERAL TRADE COMMISSION,
14 Plaintiff,
15 v.
16 BREATHOMETER, INC., a corporation,
17 and
18 CHARLES MICHAEL YIM, individually and as
19 Chief Executive Officer of Breathometer,
20 Inc.,
21 Defendants.

Case No. 3:17-cv-314

**COMPLAINT FOR PERMANENT
INJUNCTION AND OTHER
EQUITABLE RELIEF**

22
23
24 Plaintiff, the Federal Trade Commission (“FTC”), for its Complaint alleges:

25 1. The FTC brings this action under Section 13(b) of the Federal Trade
26 Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to obtain a permanent injunction, rescission
27 or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten
28 monies, and other equitable relief for Defendants’ acts or practices in violation of Sections 5(a)

1 and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, in connection with the advertising, labeling,
2 promotion, offering for sale, sale, or distribution of Breathometer Original (“Original”) and
3 Breathometer Breeze (“Breeze”), devices promoted as alcohol breathalyzers.

4
5 **JURISDICTION AND VENUE**

6 2. This Court has subject matter jurisdiction pursuant to 15 U.S.C. §§ 45(a) and
7 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345.

8 3. Venue is proper in this district under 28 U.S.C. § 1391(b)(1), (b)(2), (c)(1),
9 (c)(2), and (d), and 15 U.S.C. § 53(b).

10 **PLAINTIFF**

11 4. The FTC is an independent agency of the United States Government created by
12 statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a),
13 which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also
14 enforces Section 12 of the FTC Act, 15 U.S.C. § 52, which prohibits false advertisements for
15 food, drugs, devices, services, or cosmetics in or affecting commerce.

16 5. The FTC is authorized to initiate federal district court proceedings, by its own
17 attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be
18 appropriate in each case, including rescission or reformation of contracts, restitution, the refund
19 of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. §§ 53(b) and 56(a)(2)(A).

20 **DEFENDANTS**

21 6. Defendant Breathometer, Inc. (“Breathometer”) is a Delaware corporation with
22 its principal place of business at 863 Mitten Road, Suite 104, Burlingame, CA 94010.
23 Breathometer transacts or has transacted business in this district and throughout the United
24 States.
25

26 7. Defendant Charles Michael Yim is the founder and Chief Executive Officer of
27
28

1 Breathometer. He is a California resident. His principal office or place of business is the same
2 as that of Breathometer and, in connection with the matters alleged herein, he transacts or has
3 transacted business in this district and throughout the United States. The products, Original,
4 and the subsequent model, Breeze, were his ideas.

5
6 8. In an effort to obtain financing for his new company, Mr. Yim appeared on the
7 television show Shark Tank, which provides entrepreneurs with the opportunity to obtain
8 financing from a panel of potential investors, known as the “sharks.” In Mr. Yim’s
9 presentation, he described his idea as follows: “You have some drinks and . . . the most
10 important question is, are you safe to drive.” He also showed them a prototype of the Original
11 device, and stated that its purpose was to “help people make smarter and safer decisions.” As a
12 result of this pitch, he received funding from the sharks. The show was taped in early 2013 and
13 broadcast about nine months later.

14
15 9. Mr. Yim participated in designing the specifications of the Original product,
16 identifying product modifications, selecting industrial components for manufacturing,
17 engineering and field-testing prototypes, monitoring manufacturing goals, and shipping the
18 products to third-party vendors. He participated in drafting the instructions for use manual and
19 oversaw marketing activities for the Original, including development, review, and approval of
20 advertising content. With regard to Breeze, he played a significant role in designing the mobile
21 app user features, supervised employees responsible for advertising and substantiation, and
22 granted final clearance of the work product for manufacturing, distribution, and sale. At times
23 material to this Complaint, acting alone or in concert with others, he has formulated, directed,
24 controlled, had the authority to control, or participated in the acts and practices of Breathometer,
25 including the acts and practices set forth in this Complaint.
26
27
28

COMMERCE

1
2 10. At all times material to this Complaint, Defendants have maintained a substantial
3 course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC
4 Act, 15 U.S.C. § 44.
5

DEFENDANTS’ BUSINESS ACTIVITIES

6
7 11. Defendants designed, advertised, and sold Original and Breeze for consumer use.
8 Both products were intended to provide real-time feedback on blood alcohol content.

9 12. Original is a small device that attaches to a smartphone through the audio jack.
10 Consumers wanting to learn their blood alcohol concentration (“BAC”) would download the
11 free Breathometer app to their phone, and blow into a small hole in the device. Within about
12 five seconds, the smartphone would display a purported BAC. Original was sold through a
13 variety of outlets, including Breathometer.com, Amazon.com, BestBuy.com, Brookstone, and
14 others. The manufacturer’s suggested retail price was \$49.99. Breathometer started shipping
15 Original in mid-2013, and had gross sales of \$3.1 million as of March 2016. In most instances,
16 Defendants only tested Original devices for accuracy at 0.02% BAC, although the level at
17 which a consumer is considered too intoxicated to drive is 0.08% BAC.
18

19
20 13. Breeze is a small Bluetooth-enabled device that interacts with a smartphone.
21 Consumers wanting to learn their BAC would download the Breathometer app to their
22 smartphone, and blow into the Breeze device. Within about five seconds, the smartphone
23 would provide a purported BAC. Breathometer made its initial shipments of Breeze in mid-
24 2014. Breeze was sold through a variety of outlets, including Breathometer.com, Amazon.com,
25 BestBuy.com, Brookstone, and others. The manufacturer’s suggested retail price was \$99.99.
26 Gross sales of Breeze from mid-2014 through March 2016 totaled approximately \$2 million.
27

28 14. In late 2014, Breathometer learned of accuracy problems with Breeze devices.

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.
10

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.
22

23 **DEFENDANTS’ ADVERTISING AND MARKETING**

24 16. To induce consumers to purchase Breathometer brand breathalyzers,
25 Defendants disseminated or caused to be disseminated advertisements and promotional
26 materials, including, but not limited to, the attached Exhibits A through H. These
27
28

1 advertisements and promotional materials have contained the following representations or
2 statements, among others:

3 **Breathometer Original**

4 A. Exhibit A, Original Sell Sheet:

5 **Transform your smartphone**
6 **into a breathalyzer in seconds.**

7 *Breathometer™ gives you the power to make*
8 *smart decisions while you're drinking . . . and*
9 *assists you to make a more informed decision*
10 *about how or when to get home. Breathometer*
11 *[gives] you the ability to make informed*
12 *decisions about how and when you want to drink.*

13 *Choose Breathometer.*

14 ***Drink Smart. Be Safe.***

15 ***



20 [Text on screen states:

21 **Test Results**

22 Some alcohol has been detected.

23 .04 BAC [encircled in yellow]

24 You should be sober in
25 approximately 2 hours and
26 40 minutes.]

27 ***

28 **Just blow.**

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

3 **Make a smart decision.**

4 The Breathometer app provides more than just your
5 current blood alcohol level- it allows you to make more
6 informed decisions: access to local cab services and
7 provide guidance on when you will be “Back to Zero™”
8 - or likely sober.

9 **Accuracy.**

10 Breathometer is a FDA-registered device which boasts
11 accuracy that compares favorably to other high-end
12 breathalyzers. See product specs for further details.

13 ***

14 **Specifications**

15 **Detection Range:** 0.00 - 0.20 %BAC

16 **Power Source:** AAA Alkaline Battery

17 **Battery Life:** Approximately 75 tests

18 **Warm Up Time:** 5-15 Seconds

19 **Testing Time (Sensor Response):** 5 Seconds

20 **Sensor Accuracy:** +/- 0.01 %BAC @ 0.02 %BAC

21 **Operating Temperature:** 50F - 104F (10C - 40C)

22 **Storage Temperature:** 32F - 113F (0C - 45C)

23 September 2013 to November 2015

24 B. Exhibit B, Excerpts from Original Product Description on Amazon.com
25 website:

26
27 Product Description

28 **Breathometer**

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 0.00-0.20 % BAC.

11 **Please don't drink and drive.**

12 ***

13 Breathometer™ 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
26
27
28

1 power on the Breeze, launch the app and blow. Beyond providing
2 dependable blood alcohol concentration levels- the Breathometer app
3 tells you when you are likely to be Back to Zero and is designed to help
4 you make informed, dependable decisions. The Breathometer App
5 includes resources to help you “Get Home Safe” by accessing Uber, local
6 cabs, or your own designated drivers.
7

8 ***

9 **Easy to Use**

10 . . . Just Turn on the Breeze, launch the app and blow. Within seconds
11 you get dependable blood alcohol levels that will help you make
12 informed smart decision [sic].
13

14 ***

15 **State of The Art Technology**

16 Breeze is a FDA-registered product utilizing a state of the art Electrical
17 Chemical Fuel Cell sensor with accuracy that surpasses other high-end
18 breathalyzers. It has a BAC range of 0.000 – 0.250% BAC.
19

20 <http://www.amazon.com/Breathometer-Wearable->

21 [Wireless-Smartphone-Breathalyzer/dp/B00](http://www.amazon.com/Breathometer-Wearable-Wireless-Smartphone-Breathalyzer/dp/B00), March 19,

22 2016

23 F. Exhibit F, Excerpt from FAQs on Company Website:

24 How do I know Breeze Breathometer is accurate?
25

26 _____
27 Breeze is an FDA registered, law enforcement grade product, utilizing a
28 next generation electrochemical fuel cell sensor that has undergone

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

rigorous government lab grade testing to ensure its accuracy. We provide clear guidance in the mobile app and instruction manual to ensure that the Breathometer is utilized correctly. Nothing replaces common sense and you should never drink and drive.

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

G. Exhibit G, Breeze Product Package:

Breathometer™
Breeze™

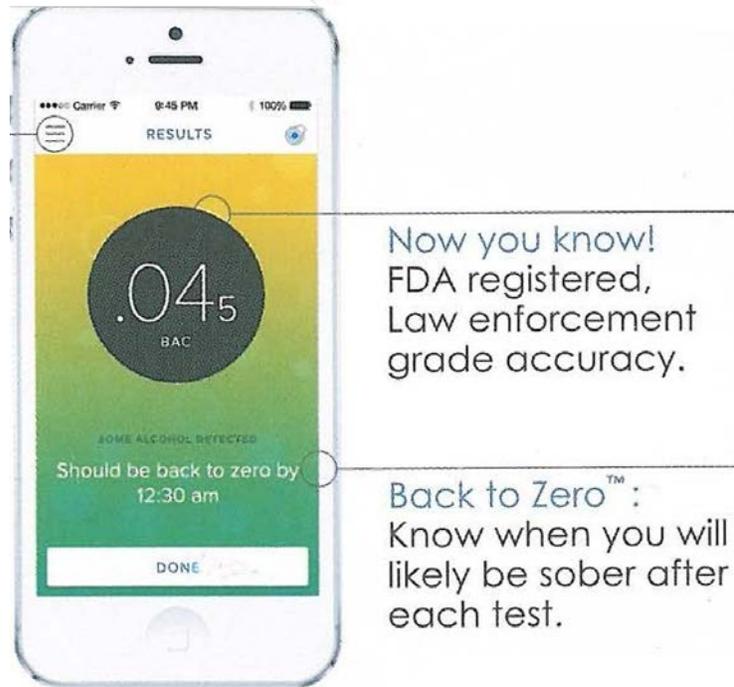
The wireless smartphone breathalyzer



Bluetooth LE BAC Detection Syncs with App

Just blow:
Blow through the mouthpiece to reveal your current condition on your smartphone.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



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

Breeze purchased by FTC, February 2, 2016

H. Exhibit H, Consumer Electronics Show 2015 Signage, reposted on Breathometer's official Facebook page:

Breathometer Breeze gives you the power to make smart decisions while you're drinking. Wirelessly transform your smartphone into a breathalyzer with 'police grade' precision in seconds with this sleek product that fits anywhere.

<https://www.facebook.com/Breathometer>, January 12, 2015

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 have 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-end breathalyzers.

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

1 E. Breathometer Breeze accurately detects a consumer's BAC for the purpose of
2 complying with impaired driving laws.

3 F. Breathometer Breeze is more accurate than other high-end breathalyzers.

4 22. The representations set forth in Paragraph 21 are false or misleading, or were not
5 substantiated, at the time the representations were made.

6
7 23. Therefore, the making of the representations as set forth in Paragraph 21 of this
8 Complaint constitutes a deceptive act or practice and the making of false advertisements, in or
9 affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a)
10 and 52.

11 **Count II: False Establishment Claims**

12
13 24. Through the means described in Paragraph 16, Defendants have represented, expressly
14 or by implication, that:

15 A. Rigorous government lab-grade tests prove that Original accurately measures
16 consumers' BAC.

17 B. Rigorous government lab-grade tests prove that Breeze accurately measures
18 consumers' BAC.

19
20 25. In truth and in fact:

21 A. Rigorous government lab-grade tests do not prove that Original accurately
22 measures consumers' BAC levels.

23 B. Rigorous government lab-grade tests do not prove that Breeze accurately
24 measures consumers' BAC levels.

25
26 26. Therefore, the making of the representations as set forth in Paragraph 24 of this
27
28

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 could 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
19 Complaint constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C.
20 §§ 45(a) and (n).
21

22
23 **CONSUMER INJURY**

24 32. Consumers have suffered and will continue to suffer substantial injury as a result of
25 Defendants' violations of the FTC Act. In addition, Defendants have been unjustly enriched as
26 a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants
27
28

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.
10

11 **PRAYER FOR RELIEF**

12
13 Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
14 and the Court's own equitable powers, requests that the Court:

15 A. Enter a permanent injunction to prevent further violations of the FTC Act by
16 Defendants;

17 B. Award such relief as the court finds necessary to redress injuries to consumers
18 resulting from violations of the FTC Act, including, but not limited to, rescission or reformation
19 of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies;
20 and
21

22 C. Award Plaintiff the costs of bringing this action, as well as such other and
23 additional relief as this Court may determine to be just and proper.
24
25
26
27
28

1 Respectfully submitted,

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DAVID C. SHONKA
Acting General Counsel

s/ Janet M. Evans _____
JANET M. EVANS
ELIZABETH JONES SANGER
Federal Trade Commission
600 Pennsylvania Avenue NW
CC-10528
Washington, D.C. 20580
DC Bar No. 10528
WI Bar No. 1080449
Phone: (202) 325-2125, -2757
Email: jevans@ftc.gov; esanger@ftc.gov

Dated: January 23, 2017

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION