UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MEGAN TAYLOR, WENDY SMOTHERS, MASSIMILIANO AGOSTINI, and OCTAVIO CHAVES, individually, on behalf of themselves, the general public and those similarly situated, Plaintiffs, v. DAVE'S KILLER BREAD, INC. FLOWERS FOODS, INC., and FLOWERS BAKERIES LLC, Defendants.	Case No. 1:23-cv-16439-SRH (consolidated) Judge Sunil Harjani

DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS FOR LACK OF STANDING

Plaintiffs' sworn admissions prove that they did not rely on, nor suffer any injury due to, the protein labeling at issue in this case. Seventh Circuit authority is clear—Article III standing requires "a *causal connection* between the injury and the conduct." *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014) (emphasis added). To establish this causal link, Plaintiffs must have relied on the labeling and have been injured as a result. While they *allege* that they did in their pleading, when they testified under oath, they swore the opposite, thereby proving they did not. Record evidence thus has made clear that they all lack standing to pursue their claims. *See Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274, 279 (7th Cir. 2020) ("the court may consider and weigh evidence outside the pleadings to determine whether it has power to adjudicate the action"). This action is therefore properly dismissed in its entirety under Federal Rule of Civil Procedure 12(b)(1).

Plaintiffs initiated this putative class action alleging that Dave's Killer Bread packaging is deceptive based on the combination of two labeling elements: (1) the front label's "5g protein" statement, plus (2) the omission of a percent daily value ("%DV") for protein in the Nutrition Facts

Panel ("NFP"). *See* ECF 28, Consolidated Complaint ("Con. Compl.") ¶ 29 ("Defendants' prominent front label protein claims made ***in the absence of any statement of the corrected amount of protein in the NFP*** deceived and mislead reasonable consumers into believing that a serving of the Products will provide the grams of protein represented on the label, when that is not true.") (emphasis added); *see also id*. at ¶ 6. They allege that the front-label protein statement drew them to the products and the omission of the %DV purportedly misled them into believing all grams listed on the front were "usable." *Id.* at ¶¶ 6, 29, 72, 78, 84, 96. Their theory of injury depends on the combined effect of these two elements as Plaintiffs conceded they are preempted from pursuing a theory based solely on either the front label or the %DV. *See*, *e.g.*, disc. *infra.*

Since filing, however, Plaintiffs' claims have unraveled. Each Plaintiff has now admitted under oath that they did not, in fact, "rely" on the alleged mislabeling. Given these admissions, Plaintiffs cannot meet their evidentiary burden to establish reliance or injury, defeating standing.

First, Plaintiffs' admissions directly contradict their allegations that the %DV's omission impacted their purchasing decisions. Plaintiffs Chaves, Smothers, and Agostini all testified that a %DV for protein had ***no impact whatsoever*** on their purchasing of the products. Chaves testified that he would have purchased the product even if the %DV had been included. **Ex. A,** Chaves Transcript ("Tr.") at 92:9–13 ("Q: If you had seen the 3 percent DV here while you were purchasing the product or while you were looking at the product, would you have purchased the product? . . . A: Yes."). Smothers testified that she would not have even looked for the %DV. **Ex. B**, Smothers Tr. at 83:15–18 (stating she "[w]ouldn't have even looked for [the %DV for protein]" when purchasing the product). And Agostini confirmed that the %DV would not have changed his view of the product. **Ex. C,** Agostini Tr. at 133:6–18 (responding "no" when asked whether a "significant disparity" between the "percentage and the number grams [of protein]" would affect

his "impression of the product at all"). For her part, Plaintiff Taylor testified that the product she purchased ***had*** a %DV for protein in the NFP—the very omission at the core of her claims. *See* **Ex. D,** Taylor Tr. at 109:11–15 ("Q: It's your best recollection that the Dave's Killer Bread product you purchased had a percent daily value for protein on it? . . . A: Yeah, it had it. Sure").

Second, as an independent ground for dismissal, the admissions of Chaves, Smothers, and Agostini show that the front protein statement did ***not*** affect their decision to buy the products. Those admissions mean they cannot show that the "front label protein claim[] made in the absence of any statement of the corrected amount of protein in the NFP" somehow deceived them "into believing" that the products "provide the grams of protein represented" on the front label. Con. Compl. at ¶ 29. Chaves testified that he "would have bought" Dave's Killer Bread even without the challenged front label protein statement. *See* **Ex. A,** Chaves Tr. at 89:16–90:13. And Smothers and Agostini confirmed that they would have known the grams of protein in the product without it being replicated on the front label because they would have looked at the NFP, where the grams of protein are required by law to be listed. *See* **Ex. B**, Smothers Tr. at 81:5–82:12; **Ex. C**, Agostini Tr. at 123:7–124:10.

Third, Chaves and Agostini continued purchasing Dave's Killer Bread after filing suit—when they were fully aware of the alleged mislabeling. *See* **Ex. C,** Agostini Tr. at 124:21–24 (testifying to post-complaint purchases "five or six months" prior to his May 29, 2025 deposition; **Ex. E**, Chaves Stop & Shop records at STOPANDSHOP_016, 025 (same); **Ex. F,** Agostini Jewel Records, at ALB_099 (confirming post-complaint purchases).

Plaintiffs' own testimony and purchasing records confirm that their purchases were not and could not have been influenced by either the front label protein statement or the %DV—and certainly never both in combination. Plaintiffs thus lack Article III standing.

BACKGROUND

Plaintiffs allege that Flowers' labels deceived consumers by "prominent[ly]" advertising "5g Protein" on the front label while omitting the corresponding %DV for protein in the NFP. *See* Con. Compl. at ¶¶ 28–29. They allege (erroneously) that the %DV for protein explains to consumers that the products deliver "significantly less protein" than the front label suggests, and they would have either not purchased the products or paid less for them. *Id*. at ¶¶ 29, 58.

The front label protein statement that Plaintiffs challenge is simply a restatement of the grams of protein required by law to appear in the NFP. *See* 21 C.F.R. 1019(c)(7). Thus, any consumer examining both the front label and the NFP would see identical protein amounts. The grams protein is consistently portrayed in both the front label and NFP. And there is no dispute that Flowers appropriately calculated this value with the "nitrogen method," the FDA method companies must use to calculate the product's grams of protein. *See* 21 C.F.R. 1019(c)(7).

Front Label Protein Statement

NFP Protein Statement

Nutrition Facts

17 servings per container
Serving size 1 Slice (45g/1.6oz)

Amount per serving
Calories 110

	% Daily Value*
Total Fat 1.5g	2%
Saturated Fat 0g	0%
Trans Fat 0g	
Polyunsaturated Fat 1g	
Monounsaturated Fat 0g	
Cholesterol 0mg	0%
Sodium 170mg	8%
Total Carbohydrate 22g	8%
Dietary Fiber 5g	17%
Total Sugars 5g	
Includes 5g Added Sugars	9%
Protein 5g	
Vitamin D 0mcg	0%
Calcium 0mg	0%
Iron 1mg	6%
Potassium 100mg	2%

*The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

Because the value for protein on the front label was properly calculated using FDA's nitrogen method, Plaintiffs are preempted from claiming that the front protein value alone rendered the label misleading.[1] Instead, they allege that the front value for protein is misleading because the label did not *also* include the %DV for protein on the NFP. *See, e.g.* Con. Compl. ¶ 29 ("Defendants' prominent front label protein claims made ***in the absence of any statement of the corrected amount of protein in the NFP*** deceived and mislead reasonable consumers into believing that a serving of the Products will provide the grams of protein represented on the label, when that is not true." (emphasis added)); *see also id*. at ¶ 6 ("Defendants' prominent protein claim on the front of the package**, *in the absence of any statement of the corrected amount of protein per serving expressed as a %DV in the NFP***, is likely to mislead reasonable consumers." (emphasis added)).

Plaintiffs plead they were first "drawn to the Products" because of the front label protein statement and were then misled because the NFP lacked a statement of "the corrected amount of protein per serving" (*i.e.*, the %DV). Con. Compl. ¶¶ 71_74, 77-80, 83-86, 95-98. Without the %DV, they claim they "ha[d] no idea" the products provide "significantly less protein" nutritionally than the stated "5g protein" suggests. *See id.* at ¶ 58; *see also id*. at ¶ 46.[2] The %DV for protein is calculated through another method (something different than the "nitrogen method" used for calculating the grams of protein in the product), called the Protein Digestibility-Corrected

[1] *See, e.g., Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 426 (7th Cir. 2011). Indeed, the likely reason why plaintiffs pursue their two-pronged theory here is because the court in the related California case ruled that "[a] claim alleging that defendants' use of total protein in nutrient content statements violates section 101.9(c)(7) is preempted." *Swartz v. Dave's Killer Bread, Inc.*, No. 4:21-CV-10053-YGR, 2022 WL 1766463, at *4 (N.D. Cal. May 20, 2022).

[2] Although not necessary for deciding this motion, Plaintiffs are wrong to suggest that most of the protein identified on the label is useless. Flowers offered expert testimony in California explaining the science disproves the allegation. Protein digestion depends on a host of individualized factors, including the foods consumed with the bread, a person's total diet, and other unique factors.

Amino Acid Score ("PDCAAS"). *See* 21 C.F.R. 1019(c)(7)(ii). Plaintiffs further plead that had the NFP included a %DV for protein, they would have made a different purchasing decision. *Id.* ¶¶ 72, 78, 84, 96 (emphasis added).

Label with the %DV

Nutrition Facts

17 servings per container

Serving size 1 Slice (45g/1.6oz)

Amount per serving

Calories 110

	% Daily Value*
Total Fat 1.5g	**2%**
Saturated Fat 0g	**0%**
Trans Fat 0g	
Polyunsaturated Fat 1g	
Monounsaturated Fat 0g	
Cholesterol 0mg	**0%**
Sodium 170mg	**8%**
Total Carbohydrate 22g	**8%**
Dietary Fiber 5g	**17%**
Total Sugars 5g	
Includes 5g Added Sugars	**9%**
Protein 5g	**3%**
Vitamin D 0mcg	0%
Calcium 0mg	0%
Iron 1mg	6%
Potassium 100mg	2%

*The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

Label without the %DV

Nutrition Facts

17 servings per container

Serving size 1 Slice (45g/1.6oz)

Amount per serving

Calories 110

	% Daily Value*
Total Fat 1.5g	**2%**
Saturated Fat 0g	**0%**
Trans Fat 0g	
Polyunsaturated Fat 1g	
Monounsaturated Fat 0g	
Cholesterol 0mg	**0%**
Sodium 170mg	**8%**
Total Carbohydrate 22g	**8%**
Dietary Fiber 5g	**17%**
Total Sugars 5g	
Includes 5g Added Sugars	**9%**
Protein 5g	
Vitamin D 0mcg	0%
Calcium 0mg	0%
Iron 1mg	6%
Potassium 100mg	2%

*The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

The Court's January 10, 2025 Order confirmed that Plaintiffs' claims depend on the relationship between the front protein statement (*e.g.*, "5g protein") and the omission of the %DV in the NFP. *Based solely on Plaintiffs pleaded allegations*, which the Court was required to accept as true, the Court found that Plaintiffs' allegations that they purchased the products after "relying on the veracity of the label" and "believe[ing]" the front value of the grams of protein due to the absence of the %DV were sufficient to allege "reliance and injury." ECF 38 at 3. In so holding, the Court recognized that to have Article III standing Plaintiffs must prove that they relied on, and were injured by, the allegedly misleading label.

Now that fact discovery is concluded, the record evidence makes clear that Plaintiffs did not rely on the allegedly misleading label and suffered no injury. They thus lack standing.

LEGAL STANDARD

An attack on the court's subject matter jurisdiction under Rule 12(b)(1) can take two forms—a facial or factual attack. *Bazile*, 983 F.3d at 279. While a facial attack tests the sufficiency of the allegations, a factual attack challenges "the existence of jurisdictional facts underlying the allegations." *Id.* Now that Flowers has brought a factual attack, "the court may consider and weigh evidence outside the pleadings to determine whether it has power to adjudicate the action." *Id.* A plaintiff's lack of standing may be raised at any time, and the Court has an "ongoing obligation to assure itself of its jurisdiction." *Flynn v. FCA US LLC*, 39 F.4th 946, 953 (7th Cir. 2022). And where a court lacks subject matter jurisdiction over a claim, the claim "must be dismissed." *See, e.g., Soni v. Jaddou*, 702 F. Supp. 3d 757, 761 (N.D. Ill. 2023), *aff'd* 103 F.4th 1271 (7th Cir. 2024).

To survive a motion to dismiss for lack of standing under Rule 12(b)(1), the party invoking the Court's subject-matter jurisdiction bears the burden of establishing jurisdiction and standing. *See Pollack v. U.S. Dep't of Just.*, 577 F.3d 736, 739 (7th Cir. 2009) ("The plaintiffs bear the burden of proving [Article III] standing."). To meet that burden, each Plaintiff must show that he or she (1) suffered an injury-in-fact (2) that is fairly traceable to Flowers' conduct and (3) and is redressable by judicial relief. *Cothron v. White Castle Sys., Inc.,* 20 F.4th 1156, 1160 (7th Cir. 2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). For an injury to be "fairly traceable" to the defendant's challenged conduct, "there must be a *causal connection* between the injury and the conduct." *Sterk*, 770 F.3d at 623 (emphasis added). In the context of the deception claims Plaintiffs have brought here, that means they must show that they relied on the allegedly misleading labels. *See Scholes v. Tomlinson*, 145 F.R.D. 485, 493 (N.D. Ill. 1992).

ARGUMENT

I. Plaintiffs Cannot Prove Reliance or Injury-in-Fact Given Their Sworn Testimony.

In a case based on an alleged misrepresentation or omission, the plaintiff must prove (i) reliance on the misrepresentation or omission at issue, and (ii) that the alleged injury is fairly traceable to the misrepresentation or omission. *See Scholes*, 145 F.R.D. at 493 (holding that plaintiffs in a class action had "no standing" to pursue common-law fraud claims where they did "not allege that they relied to their detriment on any alleged misrepresentations of the defendants"); *Casillas v. Madison Ave. Assocs.*, 926 F.3d 329, 336 (7th Cir. 2019) (holding that plaintiff must be personally harmed by an omission to have standing to sue); *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Prices Litig.*, No. 09-md-2059, 2010 WL 3893807, at *2 (D. Minn. Sep. 29, 2010) (citing *Arvitt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1033–35 (8th Cir. 2010)) (noting that the named plaintiff in a class action must have "relied upon the defendant's misrepresentations [ ] in order to have Article III standing in federal court."); *In re iPhone App. Litig.*, 6 F. Supp. 3d 1004, 1015 (N.D. Cal. 2013) ("Plaintiffs must establish actual reliance on [the] alleged misrepresentations to demonstrate causation for purposes of Article III standing.").

To establish standing in this case, where the claim is based on the combination of a front label protein statement and the omission of the %DV for protein, Plaintiffs must have relied on ***both*** the front label protein statement and the absence of the %DV for protein. *See* supra at 4–6. Indeed, this Court permitted their claims to proceed at the pleading stage because they "plausibly pled reliance and injury" by ***alleging*** that they made their purchases "after ***reading and relying*** on the veracity of the label." ECF 38 at 3 (emphasis added); *see* ECF 31, Plaintiff's Opp. to Flowers' MTD, at 12 ("Plaintiffs specifically allege that they looked at and read the NFP on the Products they purchased before purchasing them for the first time."). But Plaintiffs' deposition admissions

prove that, ***in fact***, they did ***not*** rely on the labels as alleged, and as a result there is no causal connection between Flowers' labels and their alleged injuries:

1. All four Plaintiffs testified that the presence of the %DV for protein would ***not*** have changed their decision to purchase the products.

2. Plaintiffs Chaves, Smothers, and Agostini testified that the presence of the front protein statement did ***not*** impact their decisions to purchase the products, either.

3. Plaintiffs Chaves and Agostini continued purchasing the products after being fully aware of the alleged omission of the %DV, thereby demonstrating they never relied on the alleged omission.

These admissions are fatal to Plaintiffs' claims. Without reliance, there can be no causal link to Plaintiffs' injuries, and they lack standing to pursue their claims. *See Sterk*, 770 F.3d at 623.

A. Plaintiffs Admitted That the %DV Would *Not* Have Changed Their Purchasing Behavior and, Therefore, They Lack Standing.

Plaintiffs all alleged that they "***would not have purchased the Product or would have, at minimum, paid less for it***" had it included a %DV for protein on the NFP. *Id.* at ¶¶ 72, 78, 84, 96 (emphasis added); *see also* ECF 38 at 6 ("Plaintiffs sufficiently allege that Defendants' labels are unlawful and deceptive … because Plaintiffs alleged that, had they known the percent daily value or amount of protein per serving was less, they would not have purchased the products."). It turns out that is not true. Their admissions affirmatively demonstrate that the absence of a %DV for protein on the label had no effect whatsoever on their decisions to purchase the products.

1. Chaves testified that he would have purchased the product regardless of the %DV.

At his deposition, Chaves repeatedly admitted that he still would have purchased the products even if the NFP included the %DV for protein:[3]

[3] It is unsurprising that the %DV would not have influenced Plaintiffs' purchasing decisions given the technical analysis a consumer would need to perform to make sense of it. To understand the %DV, a consumer would have had to: (1) read and rely on the front-label protein claim; (2) turn to

> Q: Is it your testimony today that you never saw the %DV in Dave's Killer Bread product?
> A: Are you talking about right now or before?
> Q: When you were purchasing the product.
> A: I did not. I saw the five grams of protein, but not the percentage, correct.
> Q: **If you had seen the 3 percent DV here while you were purchasing the product or while you were looking at the product, would you have purchased the product?**
> A: **Yes.**
> MR. BRYSON: Object to form.
> A: Yes.
> **Q: Just to make sure the record is clear on that: If you had seen the 3 percent DV here in the product you would have purchased the product?**
> Mr. Bryson: Object to form.
> **A: Yes.**

See **Ex. A**, Chaves Tr. at 91:24–92:21 (emphasis added).

2. Smothers testified that she never looked for the %DV and that it would not have influenced her purchase.

Like Chaves, Smothers admitted that she did not rely on the lack of a %DV for protein on the NFP when making her decision to purchase Dave's Killer Bread. At her deposition, she testified that she did not look for the %DV on the NFP and in any event the %DV would not have influenced her purchase decision:

> Q: Before you purchased it in 2020, do you recall there being a Percent Daily Value?
> A: I would not tell you I can remember any of that. **Wouldn't have even looked for it.**
> Q: Why not?
> A: Wouldn't have known about that yet, wouldn't have known about any of that yet. Wasn't that smart yet. I really have gotten a lot smarter since '22, and I've been getting better as I go along.
> Q: Okay. **So it wouldn't have made any difference to you whether or not there was a Percent Daily Value for protein in the product?**
> **A: Not at that –**
> Mr. Busch: Objection to form.

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the NFP; (3) locate the protein line and its %DV; (4) know that the %DV reflects PDCAAS-adjusted protein while the front label reflects total protein; (5) know that FDA's Daily Value for protein is 50 grams; (6) calculate the PDCAAS-adjusted grams of protein; and (7) conclude that, based on that calculation—e.g., 1.5 grams per slice—they should choose a different product. It is implausible that a reasonable consumer would perform this multi-step analysis.

The Witness: Not at that time.

Ex. B, Smothers Tr. at 83:15–84:5 (emphasis added); *see Muir v. Playtex Prods., LLC*, 983 F. Supp. 2d 980, 987 (N.D. Ill. 2013) (plaintiff's standing is established "at the time of purchase").

3. Agostini testified that the presence of the %DV could not have affected his purchase decision because it told him nothing about the protein in the product.

Agostini testified that he does not understand what the %DV number means, contradicting his lawyers' allegation that he would not have purchased the product if it had included a %DV.

Q: Okay. Do you know how that 3 percent is calculated?
A: No, I don't.
Q: Could you calculate it yourself?
A: No, I couldn't.
Q: No. **What does this -- does that number tell you anything about the quality of the protein in the product?**
MR. BUSCH: Objection to form.
THE DEPONENT: No.
BY MR. d'AMBROSIO:
Q: So what does it tell you? Do you know?
A: I don't.

Ex. C, Agostini Tr. at 133:6–18 (emphasis added); *see also id.* at 164:14–15 ("The number itself, I didn't understand it."). Because Agostini did not understand what %DV meant, its presence or absence could not have impacted his purchasing decision. Indeed, Agostini confirmed during his own counsel's questioning that the %DV would have been useless to him. He testified that the %DV's inclusion would not have impacted his decision to purchase the product even if there was "a significant disparity" between it and the total grams of protein listed.

BY MR. BUSCH:
Q: If you saw a label like this, but the percentage and the number of grams had a significant disparity, **would that affect your impression of the product at all?**
THE DEPONENT: **No.**

Id. at. 191:2–8 (objection omitted, emphasis added).

4. Taylor testified that the product label she purchased actually had the %DV, so she never relied on the %DV's omission.

Taylor alleged that she was misled because of the at-issue products' "failure to provide a statement of the corrected amount of protein per serving in the NFP . . . expressed as a %DV." Con. Compl. ¶ 52. Yet, despite her bringing her claims based on the *omission* of a %DV, *see id*. at ¶¶ 51–52, 72–74, Taylor testified that the product she purchased *included* a %DV for protein:

> Q: And then do you see -- do you have an understanding of what a percent daily value is?
> MR. BRANSON: Objection.
> THE WITNESS: It is the recommended percentage based on what the USDA considers ideal for humans to eat.
> BY MR. DIAMANT:
> Q: Do you see a -- do you recall whether there was a percent daily value for protein on the product that you purchased?
> MR. BRANSON: Objection.
> THE WITNESS: No. **I believe there was.** It's not always how I -- because of the way that that percentage is calculated, based on either a 200-calorie [sic] diet or a 2,500-calorie diet, I wouldn't say that's my driving number. Yes, I do look at it. Because my daughter doesn't eat 2,000 calories a day. So the percentage of the grams within it would be different based on her caloric needs. Does that make sense?
> BY MR. DIAMANT:
> Q: Yes. **It's your best recollection that the Dave's Killer Bread product you purchased had a percent daily value for protein on it?**
> MR. BRANSON: Objection.
> THE WITNESS: **Yeah, it had it.** Sure.

Ex. D, Taylor Tr. at 108:14–109:15 (emphasis added).

Obviously, Taylor could not have relied on the %DV's *absence* because she testified it was, in fact, present. Similarly, she cannot prove that the %DV omission caused her injury because she testified the product she purchased contained the %DV. *See Scholes*, 145 F.R.D. at 493; *Casillas*, 926 F.3d at 336; *In re Activated Carbon-Based Hunting*, 2010 WL 3893807, at *2; *In re iPhone App.*, 6 F. Supp. 3d at 1015.

The foregoing deposition admissions demonstrate that there is no "causal connection" between any %DV omission and Plaintiffs' purchases of the products. *See Sterk*, 770 F.3d at 623. Plaintiffs cannot prove that they relied to their detriment on, or were personally harmed by, the protein labeling at issue, so they lack Article III standing to bring their claims. *See Scholes*, 145 F.R.D. at 493; *Casillas*, 926 F.3d at 336; *In re Activated Carbon-Based Hunting*, 2010 WL 3893807, at *2; *In re iPhone App.*, 6 F. Supp. 3d at 1015.

B. Chaves, Smothers, and Agostini Testified That the Front Label Protein Statement Did Not Impact Their Purchase Decisions.

Not only would Chaves, Smothers, and Agostini still have purchased the products even if they included a %DV for protein, but these three Plaintiffs also testified they would have purchased the product even if the grams of protein were ***not*** restated on the front label. This provides an independent reason why their claims should be dismissed for lack of standing.

Chaves expressly admitted that he "would have bought" Dave's Killer Bread products even it did not say "5g protein" on the front of the package because he would have seen the same value "listed in the back." [i.e., on the NFP]. **Ex. A**, Chaves Tr. at 89:16–90:13. Similarly, Smothers testified that she still would have checked the NFP on the "back label to look at the calories in it" no matter what the front said, so she would have noticed the total grams of protein for the bread even if it were not on the front. *See* **Ex. B**, Smothers Tr. at 81:5–82:12. Finally, Agostini also admitted that he would have noticed the grams of protein the product contained even if it did not appear on the front of the package because he would have checked the NFP no matter what and noticed the total protein content there. *See* **Ex. C**, Agostini Tr. at 123:7–124:10.

Because these Plaintiffs testified they would have seen the amount of protein in the NFP anyway (which was legally required), they cannot prove their reliance on the front of label statement (much less the combination of the front label statement and omitted %DV). As such,

this is another reason why their testimony affirmatively demonstrates that no "causal connection" exists between the alleged mislabeling and their purchasing decisions, and they lack standing to bring their claims. *Sterk*, 770 F.3d at 623; *see Scholes*, 145 F.R.D. at 493; *In re Activated Carbon-Based Hunting*, 2010 WL 3893807, at *2; *In re iPhone App.*, 6 F. Supp. 3d at 1015.

C. Chaves's and Agostini's Post-Complaint Purchases Further Show They Cannot Meet Their Burden to Prove Reliance or Injury-in-Fact.

There is yet another, independent reason why Chaves and Agostini lack standing. Both Plaintiffs continued buying the products even ***after*** they filed the complaint in this case and were fully aware of the alleged mislabeling. *See* ECF 17-3 (initial class action complaint filed 9/28/2023); **Ex. E**, Chaves Stop & Shop records at STOPANDSHOP_016, 025 (showing purchases of Dave's Killer Bread Burger Buns on 6/17/2024 and Good Seed bread on 3/21/2025)[4]; **Ex. F**, Agostini Jewel Osco Records, at ALB_099 (showing purchases of Dave's Killer Bread everything bagels on 10/25/2023 of Good Seed thin-sliced bread on 12/8/2023). Agostini also testified that he continued buying the products after he filed suit, purchasing them as recently as six months before his deposition. **Ex. C,** Agostini Tr. at 124:21–24.

Their actions once they were fully aware of their theory that the omission of %DV misled consumers into believing the products contained more grams of usable protein than they in fact contained make clear that they could not have been influenced by the allegedly misleading labeling and would have purchased the products even if a %DV were present. As the Seventh Circuit has recognized, "[t]he victim of a misrepresentation about a product who learns the truth before he buys, but decides to buy the product anyway, cannot complain about the misrepresentation. Whatever he has relied on, it is not that." *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862,

[4] These records also contradict Mr. Chaves's sworn testimony, as he testified that he ceased buying Dave's Killer Bread products after seeing an advertisement from his law firm in (at the latest) 2023. **Ex. A**, Chaves Tr. at 57:13–58:6.

867 (7th Cir. 1999) (internal citation omitted); *see also Ramirez v. Kraft Heinz Foods Co.*, 684 F. Supp. 3d 1253, 1258 (S.D. Fla. 2023) (dismissing for lack of standing because "the Plaintiff continued to pay the alleged price premium knowing that" the product label was inaccurate); *Sweeney v. Kimberly-Clark Corp.*, No. 8:14-CV-3201-T-17EAJ, 2016 WL 727173, at *6 (M.D. Fla. Feb. 22, 2016) (similar). Plaintiffs' post-complaint purchases further affirmatively establish that they lack standing to pursue their claims.

II. The Court Should Dismiss Plaintiffs' Claims with Prejudice.

The Court's dismissal of Plaintiffs' claims should be with prejudice for two independent reasons. ***First***, any amendment would be futile, because Plaintiffs are bound by their sworn deposition testimony and will not be able to avoid the consequences of their admissions. *See James v. Hale*, 959 F.3d 307, 316–17 (7th Cir. 2020) (refusing to consider affidavit that incorporated by reference numerous allegations from an amended complaint that contradicted plaintiff's sworn deposition testimony). No pleading amendment can alter the fact that Plaintiffs *admitted* that they never relied on the supposedly misleading protein labelling. ***Second***, allowing an amendment at this stage would be unfair and prejudicial. *See Crest Hill Land Dev., LLC, v. City of Joliet*, 396 F.3d 801, 804 (7th Cir.2005) (holding that amendment may be denied "for reasons including undue delay, the movant's bad faith, and undue prejudice to the opposing party"). This case has been pending for over two years, fact discovery has concluded, the facts supporting this motion have been within Plaintiffs' possession and available to their counsel for the entire time the case has been pending. Because Plaintiffs' sworn admissions contradict their allegations, the case is properly terminated.

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' claims with prejudice.

DATED: January 15, 2026

KING & SPALDING LLP

By: */s/ Livia M. Kiser*

Livia M. Kiser
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