

Doc. 25 at 5, ¶ 1; Doc. 25 at 8, ¶ 10. Mr. Kiefer's status as a corporate officer is insufficient to confer standing to sue under the antitrust laws.

The Third Circuit addressed the precise situation before the Court over 30 years ago, in *Pitchford v. Pepi, Inc.*, 531 F.2d 92 (3rd Cir. 1976). There, a corporate officer sued to recover damages allegedly resulting from antitrust violations directed at his company. The Third Circuit reversed a verdict in favor of the corporate officer, finding that the officer lacked standing: "any harm to Mr. Pitchford would have to flow derivatively from injuries done to the companies of which he was ... an officer" 531 F.2d at 97. Other courts of appeal have reached the same conclusion. See *National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 608 (11th Cir. 1984) ("Neither an officer nor an employee of a corporation has standing to bring an action in his own right for an antitrust violation causing injury to the corporation and its business"); *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1378 (7th Cir. 1987) "Merely derivative injuries sustained by ... officers ... of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing").

In order to state a claim for relief and establish subject matter jurisdiction, a party's pleading must affirmatively establish that he has standing. See *McKinney v. U.S. Dept. of Treasury*, 799 F.2d 1544, 1555 (Fed. Cir. 1986) (to establish standing, complaint must allege facts sufficient to shown injury in fact); *Mariana v. Fisher*, 338 F.3d 189, 204-06 (3rd Cir. 2003) (affirming dismissal of complaint that failed to establish standing). Here, Mr. Kiefer's pleading affirmatively shows that he does not have standing. His Counterclaim should accordingly be dismissed.

Respectfully submitted,

s/ Gary Peterson

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CERTIFICATE OF SERVICE

I certify that I electronically transmitted this document to the Clerk using the ECF System so as to cause transmittal of a Notice of a Electronic Filing to the following ECF registrant:

Andrew J. Katsock, III

Attorney for Babyage.com, Inc. and John M. Kiefer, Jr., on February 19, 2008.

s/ Gary Peterson