UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT SCOTT BATCHELAR,	:	
	:	
Plaintiff,	:	Civil No. 3:15-cv-1836(AWT)
	:	
v.	:	
	:	
INTERACTIVE BROKERS, LLC;	:	
INTERACTIVE BROKERS GROUP, INC.;	:	
and THOMAS A. FRANK,	:	
	:	
Defendants.	:	

RULING ON MOTION TO DISMISS

Plaintiff Robert Scott Batchelar ("Batchelar") brings a claim against Interactive Brokers, LLC ("Interactive") alleging that its trading software was negligently designed, and the result was an automatic liquidation of the positions in his account that cost him thousands of dollars more than it should have. He has also sued Interactive's parent company, Interactive Brokers Group, Inc. ("IBG"), under a theory of respondeat superior, and Thomas A. Frank ("Frank"), an officer of IBG, claiming he was personally responsible. The defendants have moved to dismiss these claims pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the motion to dismiss is being denied.

I. FACTUAL BACKGROUND

Interactive is a federally licensed online deep-discount broker-dealer. Interactive executes orders on behalf of its customers for a variety of securities. However, Interactive does not provide customers with any investment advice or strategy, and all trades are made at the direction of the customer. This is known in the securities industry as a non-discretionary broker. Customers place their orders to Interactive online, and Interactive then uses a proprietary computer software to automatically execute its customers' orders on various exchanges.

Batchelar was a customer of Interactive starting in August 2011. He had a margin-trading account with Interactive. A margin-trading account allows an investor to purchase securities beyond her cash on hand, with the additional purchase secured by certain collateral in her trading account. However, when a customer's risk threshold becomes too high due to inadequate collateral--called a margin deficiency--federal regulations and the Customer Agreement allow the broker-dealer to liquidate the positions in the account to eliminate the deficiency and the risk to the broker-dealer and the financial system as a whole. Both the regulations and the Customer Agreement permit the broker-dealer to make such a liquidation without notifying the customer.

Interactive's computer software continuously and automatically determines whether there is a margin deficiency in an account. The software compares the margin account requirement (also referred to as the collateral requirement) as determined by Interactive with the net liquidating value of the margin account at that time. If the margin account requirement exceeds the net liquidating value, the software declares a margin deficiency and begins to automatically liquidate the positions in the account without notice. Once it determines a margin deficiency, the software locks the account, cancels all pending trades, and prohibits the customer from depositing additional collateral or ordering particular trades to cure the deficiency while it liquidates the positions. No human interaction or decision-making is involved once the software declares a deficiency.

On August 24, 2015, Interactive's software declared a margin deficiency in Batchelar's account and began liquidating his positions. All that Batchelar held in his account at that time were positions in a security called "SPX put option," which is a derivative on the Standard and Poor's 500 stock index. Batchelar had short-sold these positions, so as the sale price went higher, he lost more money.

After declaring a margin deficiency, the software began liquidating Batchelar's positions. It started at 10:11:15 A.M.

and ended at 10:31:37 A.M. In that time, Interactive's software made fifty-one trades at prices ranging from $5.00 to $83.40 per unit. At one point, during a nineteen-second period, the software executed eight trades at prices ranging from $7.00 to $83.40 per unit. This was higher than the going market price for the securities at the time of the sale. Batchelar claims that those transactions disproportionate to the market cost him somewhere between $95,145 and $113,807.

In his Second Amended Complaint, Batchelar alleges that the auto-liquidation was "the result of negligent design, coding, testing and maintenance." (Second Am. Compl. ("SAC") ¶ 65, ECF No. 70.) He alleges that the programming flaws were the result of Interactive's failure to meet industry standards in its design and testing of the software (see id. ¶ 69) and its failure to include certain instructions in the algorithm (see id. ¶¶ 74-75; 74 n.3; 75 n.4). Consequently, Batchelar brings a claim for negligence against Interactive. In addition, he brings a claim for negligence against Frank alleging that Frank is personally responsible for developing, programming, and maintaining the software, and a claim against Frank's employer, IBG, alleging vicarious liability.

II. LEGAL STANDARD

When deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the

complaint and must draw inferences in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 550, 555 (2007) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555 (citations omitted). However, the plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Id. at 568. "The function of a motion to dismiss is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Mytych v. May Dep't Store Co., 34 F. Supp. 2d 130, 131 (D. Conn. 1999) (quoting Ryder Energy Distribution v. Merrill Lynch Commodities,

Inc., 748 F.2d 774, 779 (2d Cir. 1984)). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232).

In its review of a motion to dismiss for failure to state a claim, the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993). "[I]n some cases, a document not expressly incorporated by reference in the complaint is nevertheless 'integral' to the complaint and, accordingly, a fair object of consideration on a motion to dismiss. A document is integral to the complaint 'where the complaint relies heavily upon its terms and effect.'" Goel v. Bunge, Ltd., 820 F.3d 554, 559 (2d Cir. 2016) (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)).

"Absent law from a state's highest court, a federal court sitting in diversity has to predict how the state court would resolve an ambiguity in state law." Haar v. Nationwide Mut. Fire Ins. Co., 918 F.3d 231, 233 (2d Cir. 2019) (quoting Michalski v. Home Depot, Inc., 225 F.3d 113, 116 (2d Cir. 2000)).

III. DISCUSSION

A. Claim against Interactive

The defendants make three arguments in support of their motion to dismiss the claim against Interactive. First, they assert that Interactive's duties are defined exclusively by the Customer Agreement, that the Customer Agreement expressly authorized Interactive to liquidate the positions in a margin-deficient account, and that under the Customer Agreement Interactive has "sole discretion to determine the assets to be liquidated and the order/manner of liquidation." (Defs.' Memo. of Law in Supp. of Defs.' Mot. to Dismiss ("Defs.' Memo.") 18, ECF No. 75-7.) Then, the defendants argue that "Batchelar's negligence claim 'is essentially an allegation that if [Interactive] had correctly performed its obligations under the contract . . . [Batchelar] would not have suffered harm.'" (Id. at 22.) However, while that may have been the essence of the allegations with respect to the plaintiff's previously dismissed breach of contract claim,[1] as reflected in the discussion below, that is not the substance of Batchelar's negligence claim.

Second, the defendants argue that this claim is barred under the economic loss doctrine. "[T]he economic loss doctrine

[1] See Batchelar v. Interactive Brokers, LLC, No. 3:15-CV-01836 (VLB), 2016 WL 5661980, at *4-5 (D. Conn. Sept. 28, 2016), aff'd in part, vacated in part, Batchelar v. Interactive Brokers, LLC, 751 F. App'x 55 (2d Cir. 2018).

bars negligence claims that arise out of and are dependent on breach of contract claims that result only in economic loss." Ulbricht v. Groth, 310 Conn. 375, 410 (2013). It bars tort claims if "the defendants' duty to the plaintiffs arose exclusively out of the contractual relationship. If no contractual duty were found, the tort claims could not survive." Id. at 405 n.28. The doctrine is driven by the premise that it "holds the aggrieved party to the bargain it struck in its contract by preventing it from bringing a tort action for what is really the breach of a contractual duty." Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F. Supp. 2d 159, 165 (D. Conn. 2010). It therefore aims to "protect[] the parties' expectancy interests and encourages them to build cost considerations into their contracts in the first place." Id.

The Connecticut Supreme Court has made it clear that the economic loss doctrine does not bar all tort claims which accompany breach of contract claims. In Ulbrich, the court explained that the doctrine bars "tort claims that arise out of and are dependent on the contractual relationship between the parties." 310 Conn. at 404. On the other hand, it does not bar "tort claims that are 'independent' of the plaintiff's contract claim, and that can survive even if the contract claim fails." Id.

In light of the explanation by the Connecticut Supreme Court in Ulbrich, where the court took pains to explain the distinction between its holdings in Flagg Energy Development Corp. v. General Motors Corp., 244 Conn. 126 (1998), and Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559 (1995), the court finds unpersuasive the defendants' argument that "in Ulbrich and Lawrence [v. O & G. Indus., Inc., 319 Conn. 641 (2015)], the Connecticut Supreme Court extended the economic loss doctrine to preclude claims in tort where a contract exists between the parties and only economic losses are alleged" (Defs.' Reply in Further Supp. of Defs.' Mot. to Dismiss 10-11, ECF No. 90).[2] See also Raspberry Junction Holding, LLC v. Se. Conn. Water Auth., 331 Conn. 364, 368 n.3 (2019) (Connecticut Supreme Court observing: "We have thus far found it unnecessary to decide whether 'we should adopt the economic loss doctrine as a categorical bar to claims of economic loss in negligence cases without property damage or physical injury.'"); Pride

[2] The defendants cite to footnote fifteen in Lawrence for the proposition that "the Connecticut Supreme Court clarified without qualification that 'the economic loss doctrine . . . bars negligence claims for commercial losses arising out of the defective performance of contracts' in Lawrence v. O & G Indus., Inc. . . . ." (Defs.' Memo. at 27.) However, nothing in Lawrence purports to clarify Ulbrich. The court merely recognized that it previously had "considered that aspect of the 'economic loss doctrine [that] bars negligence claims for commercial losses arising out of the defective performance of contracts'" in Ulbrich. Lawrence, 319 Conn. at 661 n.15 (quoting Ulbrich, 310 Conn. at 399).

Acquisitions, LLC v. Osagie, No. 3:12-CV-639 JCH, 2014 WL 4843688, at *13 (D. Conn. Sept. 29, 2014) (finding that the economic loss doctrine did not bar negligence claims where the plaintiff "d[id] not predicate his negligence claims upon [the defendant's] breach of his contract," but rather alleged breach of "the duties imposed by the Fair Credit Reporting Act"); Connex Credit Union v. Barbarino Bros., No. CV166066292S, 2018 WL 4038227, at *4 (Conn. Super. Ct. Aug. 1, 2018) (finding negligent supervision and tortious interference claims were independent of breach of contract claim and thus not barred by the economic loss doctrine).

Here, Batchelar has shown that he has alleged facts demonstrating that Interactive's "duty arises from conduct . . . that is independent of the contract and from conduct that does not breach the contract but does breach [Interactive]'s duty of due care." (Pl.'s Memo. in Opp'n to Mot. to Dismiss 6, ECF No. 87.) Taking the factual allegations in the complaint as true and drawing inferences in a light most favorable to the plaintiff, the court agrees with Batchelar that Interactive's "conduct in voluntarily choosing, testing, maintaining and using the liquidation algorithm during the period [from] 2006 until the moment before the contract with Batchelar became effective is conduct temporally independent of the contract," and also that Interactive's "conduct in failing to test and maintain the

liquidation algorithm during the term of the contract is not a breach of the contract, but is a breach of the duty of due care . . . .” (Id.)

Third, the defendants argue that there is no actionable negligence here because they owed no duty to Batchelar under Connecticut law. Batchelar alleges that Interactive “was under a duty to exercise that degree of care which a skilled non-discretionary broker of ordinary prudence would have exercised under the same or similar conditions. . . . [and that] [Interactive] breached this duty of care by using the flawed Auto-Liquidation Software.” (SAC ¶ 101.) He also alleges that Interactive had a duty to use care in the design, coding, testing, maintenance, and use of the liquidation algorithm, which it failed to do. (See id. ¶¶ 2, 4, 44, 65.)

“The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury.” Sic v. Nunan, 307 Conn. 399, 406 (2012) (quoting Pelletier v. Sordoni/Skanska Constr. Co., 286 Conn. 563, 593 (2008)). “Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action.” Id. at 407 (quoting Pelletier, 286 Conn. at 593-94). “The existence of a duty is a question of law” for the court, and once it has been established that a duty existed, “the trier of fact then determine[s] whether the defendant

violated that duty in the particular situation at hand." Id. (quoting Pelletier, 286 Conn. at 593). Within the element of duty, "there are two distinct considerations: . . . . [f]irst, it is necessary to determine the existence of a duty, and then, if one is found, it is necessary to evaluate the scope of that duty." Id. at 406-07 (quoting Pelletier, 286 Conn. at 593). "The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual." Id. at 407 (quoting Pelletier, 286 Conn. at 593). When a contract exists between the parties, "[c]are must also be taken not to enlarge the scope of the promisee's undertaking beyond that in his contract." Dean v. Hershowitz, 119 Conn. 398, 177 A. 262, 267 (Conn. 1935).

In Sic, the court stated: "Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant." 307 Conn. at 407 (quoting Pelletier, 286 Conn. at 594). "[T]he test for the existence of a legal duty entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its

negligent conduct should extend to the particular consequences or particular plaintiff in the case." Id. at 407-08 (quoting Mazurek v. Great Am. Ins. Co., 284 Conn. 16, 29 (2007)). The public policy analysis requires the court to assess the following four factors: "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." Ruiz v. Victory Props., LLC, 315 Conn. 320, 337 (2015) (quoting Monk v. Temple George Assocs., 273 Conn. 108, 118 (2005)).

However, this public policy analysis is required only if the duty seeking to be imposed is "novel." Doe v. Yale University, 252 Conn. 641, 665 (2000). If the "plaintiff's claim alleges the breach of a previously recognized duty and, therefore, does not seek recovery based on a novel claim, the [public policy] analysis" is not applicable. Id. at 666. Batchelar asserts that the public policy analysis is not applicable here because Connecticut courts have already recognized a common-law duty of care for computer programmers, citing Metpath, Inc. v. IDS Corp., No. CV 89-0435312S, 1991 WL 39617 (Conn. Super. Mar. 12, 1991). But Metpath has not been cited by any Connecticut court in a published decision for the proposition that "[t]hose in the computer industry should be

held to an ordinary standard of care." Id. at *1. Also, Metpath was decided before the Connecticut Supreme Court articulated the public policy requirement in RK Constructors, Inc. v. Fusco Corp., 231 Conn. 381, 386 (1994), so no such analysis was required in Metpath, and there was none. Rather, the court simply relied on Invacare Corp. v. Sperry Corp., 612 F. Supp. 448 (N.D. Ohio 1984), a case applying Ohio law. Thus, given the absence of a reasoned analysis in Metpath, the court concludes that the Connecticut Supreme Court would require engaging in the public policy analysis in this case.

1. Foreseeability

"The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised." Sic, 307 Conn. at 407 (quoting Pelletier, 286 Conn. at 594). "By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury [that] resulted was foreseeable." Ruiz, 315 Conn. at 328 (quoting Mirjavadi v. Vakilzadeh, 310 Conn. 176, 191 (2013)).

It appears that Interactive does not dispute that Batchelar has alleged harm that was foreseeable. In any event, given the purpose of the auto-liquidation software, the court concludes that Batchelar has alleged that he suffered losses that were a foreseeable result of the failure by Interactive to use care,

which resulted in its use of software that was negligently designed and maintained.

2. Public Policy Factors

The first public policy factor is "the normal expectations of the participants in the activity under review." Ruiz, 315 Conn. at 337. To determine the participants' expectations, Connecticut courts look to "Connecticut's existing body of common law and statutory law" relating to the issue at hand. Lawrence, 319 Conn. at 651 (collecting cases).

Batchelar argues that customers and brokers expect that brokers will be liable to customers when they negligently execute a trade. He also points to an arbitration award against Interactive to show that Interactive is aware that it must compensate customers who suffer a loss due to its negligence. See Principle Capital Partners, L.P. v. Interactive Brokers LLC, FINRA Case No. 11-01626 (Dec. 20, 2013) (finding Interactive liable for negligence). Interactive maintains that the Customer Agreement and federal regulations would lead a customer to expect that Interactive is entitled to take action in its sole discretion in the event of a margin deficiency. See Order Approving NASD Proposed Rule Change Relating to the Delivery Requirement of a Margin Disclosure Statement to Non-Institutional Customers ("Margin Disclosure Rule"), 66 Fed. Reg. 22,274-01, 22,276-77, 22,280 (May 3, 2001).

Interactive emphasizes that the rules of the Financial Industry Regulatory Authority ("FINRA") concerning margin trading give broker-dealers "the unfettered right to liquidate" positions in a customer's margin-deficient account. (Defs.' Memo. at 15.) But what the federal regulatory scheme ensures is that "if a broker-dealer believes that the collateral for the margin loan is at risk, the broker-dealer is entitled to take any steps necessary to protect its financial interests, including immediate liquidation without notice to the customer." Margin Disclosure Rule, 66 Fed. Reg. at 22,276-77; see also id. at 22,277 ("because the securities and other assets in any of the customers'[] accounts are collateral for the margin loan, the broker-dealer has the right to control the disposition of the collateral in order to protect its interests"). It does not follow that the FINRA regulations contemplate Interactive being shielded from liability for using software it designed in a negligent manner to take such protective steps.

The court concludes that the expectations of the parties favors finding that a duty to use care exists here. Although Interactive is correct that the regulations and the Customer Agreement permit it to liquidate the positions in a margin-deficient account in its sole discretion, that does not mean that the parties would normally expect that Interactive has the right to liquidate the positions in the account in a negligent

manner. Moreover, the fact that Interactive has been found liable, in a FINRA arbitration, to at least one customer for negligence suggests that the parties would expect that Interactive would be liable for the negligent execution of trades.

Thus, the court finds unpersuasive Interactive's argument that permitting a negligence claim for the flawed design of its software would "enlarge the scope of [Interactive's] undertaking beyond that in [its] contract." Dean, 119 Conn. 398, 177 A. at 267; see Meyers v. Livingston, Adler, Pulda, Meiklejohn and Kelly, P.C., 311 Conn. 282, 291 (2014) ("[W]e are mindful of the well established principle that an independent claim of tortious conduct may arise in the context of a contractual relationship."); Johnson v. Flammia, 169 Conn. 491, 496 (1975) ("liability may arise because of injury resulting from negligence occurring in the course of performance of the contract").

The second factor is the public policy of encouraging participation in the activity, while weighing the safety of the participants. Given the role of the capital markets in our economy, the public interest in encouraging participation in the trading of securities by both investors and broker-dealers is high. At the same time, there is also a strong public interest in ensuring the safety and integrity of the markets, as

evidenced by the significant state and federal regulation. The court concludes that, with respect to investors, the existence of a duty to use care is consistent with both encouraging participation in securities trading and ensuring the safety of individuals engaged in securities trading, including those trading on margin. The court concludes that, with respect to broker-dealers, the existence of a duty to use care will not have an adverse impact on their willingness to participate in the markets because they are in a position to identify and manage the resulting risks, and their safety is not a relevant consideration. Thus, this factor weighs in favor of finding the existence of a duty to use care.

The third public policy factor is the avoidance of increased litigation. In Ruiz, the court concluded that imposing the duty at issue would not lead to a "significant increase in litigation," and in addition, "agree[d] with the Appellate Court that, rather than unnecessarily and unwisely increasing litigation, imposing a duty in this case will likely prompt landlords to act more responsibly towards their tenants . . . ." 315 Conn. at 340. Interactive contends that the existence of a duty to use care will "lead to increased litigation." (Defs.' Memo. at 35.) However, the fact that there is merely an increase in litigation is not dispositive with respect to this factor. See Lawrence, 319 Conn. at 655 ("[T]his is true anytime a court

establishes a potential ground for recovery." (quoting Monk, 273 Conn. at 120)). Given (i) the "dearth of claims with fact patterns similar to the present case," Munn v. Hotchkiss School, 326 Conn. 540, 562 (2017), i.e., claims that a broker-dealer's software was negligently designed and caused the customer to suffer losses beyond what he would have suffered had the liquidation been conducted with an algorithm that was not negligently designed, and (ii) the challenges involved in investigating, pleading, and proving such a claim, the court concludes that the risk here of unnecessarily and unwisely increasing litigation is very low. Moreover, considering this factor together with the second factor, see Lawrence, 319 Conn. at 658, the court concludes that the increase in safety to investors outweighs the potential for increased litigation. This is so because the logical import of Interactive's position is that a broker-dealer owes no duty at all to investors to exercise care when designing and testing software it will use to manage the investors' accounts. Thus, the court concludes that this public policy factor weighs in favor of finding the existence of a duty to use care.

The fourth public policy factor is the decisions of other jurisdictions. Courts in other jurisdictions have held that a non-discretionary broker-dealer owes a duty of care to its customers, although the duty is more limited than the duty owed

by a traditional broker. In de Kwiatkowski v. Bear, Stearns & Co., 306 F.3d 1293 (2d Cir. 2002), the court, applying New York law, observed that:

> It is uncontested that a broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis. The broker's duties ordinarily end after each transaction is done, and thus do not include a duty to offer unsolicited information, advice, or warnings concerning the customer's investments. A nondiscretionary customer by definition keeps control over the account and has full responsibility for trading decisions.

306 F.3d at 1302. However, the court went on to state that: "On a transaction-by-transaction basis, the broker owes duties of diligence and competence in executing the client's trade orders . . . ." Id.; see also Christian Mem'l Cultural Ctr., Inc. v. Alan B. Lancz & Assocs., Inc., 989 F.2d 498 (6th Cir. 1993) (per curiam) (table decision) (holding, under Michigan law, that a "nondiscretionary broker only owes a duty to execute transactions properly"); Anwar v. Fairfield Greenwich Ltd., 891 F. Supp. 2d 548, 557 (S.D.N.Y. 2012) (noting that, under Florida law, "even nondiscretionary broker-dealers owe their clients general duties of loyalty and care"). Thus, this factor weighs in favor of the existence of a legal duty.

Therefore, after assessing the four public policy factors, the court concludes that they weigh in favor of finding that Interactive had a duty to use care as to Batchelar.

Accordingly, after considering the issue of foreseeability and analyzing the public policy factors, the court concludes that Connecticut courts would recognize an independent extracontractual duty owed by Interactive to Batchelar to use care in designing and using the auto-liquidation software. Thus, the motion to dismiss is being denied with respect to the claim against Interactive.

B. Claim against Frank

Batchelar seeks to hold Frank, who is an officer of IBG, personally liable for negligence in the design, testing, programming, and maintenance of the software. Batchelar claims that Frank failed to "exercise that degree of care in designing, coding, testing, maintaining and approving the Auto-Liquidation Software, and supervising others to do the same, which a skilled professional of ordinary prudence would have exercised under the same or similar conditions." (SAC ¶ 96.) In support of this claim, Batchelar alleges that "[t]he Auto-Liquidation Software is designed, coded, developed, tested, and maintained internally by Defendants," (id. ¶ 86) and that Frank "is the Chief Information Officer . . . of IBG [and] Frank is responsible for the development and maintenance of [Interactive]'s trading, processing, and communications systems" (id. ¶ 87). The plaintiff also alleges that Frank "wrote or is responsible for the functioning of the auto-liquidation algorithm at issue in

this case" and that "Frank through action or inaction has negligently caused or permitted the auto-liquidating algorithm to exist in its flawed condition." (Id.) The plaintiff alleges further that Frank was hired by IBG "to ensure proper functioning of the auto-liquidation algorithm," (id. ¶ 89) and that Frank "knew the software's intended purpose and the fact the software would be used to liquidate collateral in customer[s]'[] accounts" (id. ¶ 88).

1. Duty to Use Care

It appears that the defendants do not dispute that Batchelar has alleged harm that was foreseeable, and in any event, the court concludes that Batchelar has alleged that he suffered losses that were a foreseeable result of Frank's conduct. Rather, the defendants argue that Frank "did not owe Batchelar any duty sufficient to sustain a negligence claim because public policy, as interpreted by the Connecticut Supreme Court, does not support extending a duty to claims in which the defendant and plaintiff lack privity of contract, and the plaintiff has suffered only economic loss without any personal injury or damage to property." (Defs.' Memo. at 40.) While the defendants highlight these two considerations, the public policy analysis requires the court to assess the four public policy factors.

The first public policy factor is "the normal expectations of the participants in the activity under review." Ruiz, 315 Conn. at 337. The court concludes that both Batchelar and Frank, as well as Interactive and IBG, would expect a software designer to use care when designing, testing, and maintaining software, because, inter alia, it was foreseeable to Batchelar and to Frank that failure to use care might result in a flaw in the software that could cause the specific type of harm claimed by Batchelar here. See, e.g., Turnage v. Oldham, 346 F. Supp. 3d 1141, 1156 (W.D. Tenn. 2018) (finding that software company hired to design software for another defendant "could reasonably have foreseen that negligently installing, designing, or integrating the . . . software would lead to" damages to the non-contract-party plaintiffs); Cahoo v. SAS Inst. Inc., 322 F. Supp. 3d 772, 810 (E.D. Mich. 2018), rev'd in part on other grounds, 912 F.3d 887 (6th Cir. 2019) (finding that harm to plaintiffs was foreseeable to software-designer defendant who allegedly negligently designed software for state defendant); Davis v. Dallas Cty., 541 F. Supp. 2d 844, 853 (N.D. Tex. 2008) (finding that software company hired to design software for another defendant could have reasonably foreseen the harm to the plaintiffs from negligent software design and implementation).[3]

[3] But see, e.g., Green Desert Oil Grp. v. BP W. Coast Prod., No. C 11-02087 CRB, 2011 WL 5521005, at *5 (N.D. Cal. Nov. 14,

Also, to determine participants' expectations, Connecticut courts look to "Connecticut's existing body of common law and statutory law" relating to the issue at hand, Lawrence, 319 Conn. at 651 (collecting cases), and in Metpath, which to the court's knowledge is the only Connecticut decision on point, the court held that "the plaintiff's allegation that the defendant was negligent in failing to properly configure the system is a claim of simple negligence rather than computer malpractice." 1991 WL 36917, at *1.

The second factor is the public policy of encouraging participation in the activity, while weighing the safety of the participants. With respect to investors such as Batchelar, the court's analysis here is the same as the analysis, set forth above, with respect to the claim against Interactive. With respect to Frank, the safety of software designers is not a relevant consideration, and the court concludes that the existence of a duty of care will not have an adverse impact on

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2011), aff'd, 571 F. App'x 633 (9th Cir. 2014) (finding software company's negligence not foreseeable where contract to provide software did not specifically state that it was intended for the particular plaintiffs). Green Desert Oil is not persuasive authority because its test for foreseeability is more restrictive than the test under Connecticut law. See Ruiz, 315 Conn. at 328 ("By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury [that] resulted was foreseeable." (quoting Mirjavadi, 310 Conn. at 191)).

the willingness of software designers to engage in that activity because they are in a position to identify and manage the resulting risk.

The third public policy factor is the avoidance of increased litigation. The court's analysis here is the same as the analysis, set forth above, with respect to the claim against Interactive because the same considerations that apply to Interactive as a broker-dealer apply to Frank as the software designer.

The fourth public policy factor is the decisions of other jurisdictions. Courts in other jurisdictions have held that a simple negligence claim can be brought for the negligent design of computer software. See, e.g., Turnage, 346 F. Supp. 3d at 1156 (denying motion to dismiss negligence claim under Tennessee law for negligent installation and design of computer software); Cahoo, 322 F. Supp. 3d at 810 (recognizing claim for negligent design and maintenance of software under Michigan law, but dismissing it because damages were not adequately pled); Davis, 541 F. Supp. 2d at 850-51 (denying motion to dismiss negligence claim under Texas law for negligent installation and design of computer software); Hosp. Computer Sys., Inc. v. Staten Island Hosp., 788 F. Supp. 1351, 1361 (D.N.J. 1992) (noting that duties "under ordinary tort principles" are imposed on software

designers under New York law).[4] Moreover, in each of Turnage, Cahoo, and Davis, the court found that the duty was owed to a non-party to the original contract to design the software, as is the case here with respect to Frank.

The defendants argue that public policy, as interpreted by the Connecticut Supreme Court, does not support extending a duty to use care where a plaintiff has suffered only economic loss without any personal injury or damage to property. But that public policy, which is embodied in the economic loss doctrine, should receive no weight because the tort claim brought here is independent of any claim arising out of a contract to which Batchelar and any of the defendants was a party. For the same reasons, the defendants' argument that public policy, as interpreted by the Connecticut Supreme Court, does not support extending a duty to use care to claims where the defendant and

[4] What courts have not held, however, is that a claim for professional negligence or "computer malpractice" exists with respect to the design of computer software. See Superior Edge, Inc. v. Monsanto Co., 44 F. Supp. 3d 890, 912 (D. Minn. 2014) (noting that "[o]f the courts to consider the question, the overwhelming majority have determined that a malpractice or professional negligence claim does not lie against computer consultants or programmers," and collecting cases); see also David T. Nimmer, Law of Computer Technology § 9:30 (2019) ("Yet, despite the complexity of the work, computer programming and consultation lack the indicia associated with professional status for purposes of imposing higher standard of reasonable care."). Batchelar does not claim computer malpractice.

the plaintiff lacked privity of contract should receive no weight.

Therefore, after weighing the four public policy factors, the court concludes that they weigh in favor of finding that Frank owed a duty to Batchelar to use care in designing, testing, programming, and maintaining the software.

2. Personal Involvement

The defendants also argue that "Batchelar has wholly failed to allege [Frank's] personal participation in the purportedly negligent activity that led to the liquidation of his margin-deficient account . . . ." (Defs.' Memo. at 41.)

"It is well established that an officer of a corporation does not incur personal liability for its torts merely because of his official position." Sturm v. Harb Dev., LLC, 298 Conn. 124, 132 (2010) (quoting Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 141-42 (2005)). However, where "an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby." Id. (quoting Ventres, 298 Conn. at 142). This is so even though "liability may also attach to the corporation for the tort." Id. (quoting Ventres, 298 Conn. at 142). Thus, a plaintiff must allege that the director or officer personally committed the tort, personally directed that the tortious act be done, or personally

participated or operated in the tort. See id. ("Thus, a director or officer who commits the tort or who directs the tortious act done, or participates or operates therein, is liable to third persons injured thereby . . . ." (quoting Ventres, 275 Conn. at 142).

Here, Batchelar has alleged that Frank, in his capacity as the Chief Information Officer of IBG, was responsible for the development, testing, programming, and maintenance of the software at issue here, and that he "wrote or is responsible for the functioning of the auto-liquidation algorithm at issue in this case." (SAC ¶ 87.) Thus, Batchelar has adequately pled Frank's personal involvement.

The cases on which Frank relies are inapposite. See Hart v. World Wrestling Entm't, Inc., No. 3:10CV0975 SRU, 2012 WL 1233022, at *9 (D. Conn. Apr. 10, 2012) (dismissing negligent supervision claim where the plaintiff did not allege personal knowledge of the employee's actions); D'Angelo Dev. & Const. Corp. v. Cordovano, 121 Conn. App. 165, 185-186 (2010) (affirming dismissal of case as to corporation's president because there were no allegations with respect to how the officer owed a duty to the plaintiff "in his individual capacity"); Burress v. Re-Innovation, Ltd., No. FSTCV096001934S, 2012 WL 5936064, at *5 (Conn. Super. Ct. Sept. 13, 2012) (dismissing claim because the plaintiff "failed to allege the

source of [the defendant's] duty, as an individual, to perform the work" in a workmanlike manner, as opposed to the LLC's obligation). Also, the defendants' contention that Frank was, in fact, not personally involved must be raised in a motion for summary judgment, not in a motion to dismiss. See Scheuer, 416 U.S. at 236 (on a Rule 12(b)(6) motion, the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff).

Thus, the motion to dismiss is being denied with respect to the claim against Frank.

C. Claim against IBG

Batchelar claims that "IBG's liability is derivative of Frank's liability," as he is IBG's employee. (SAC ¶ 103.) "Under the doctrine of respondeat superior, a master is liable for the wilful torts of his servant committed within the scope of the servant's employment and in furtherance of his master's business." Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 500 (1995). "The master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject." Id. (quoting Stulginski v. Cizauskas, 125 Conn. 293,

296 (1939)). To be held vicariously liable, "the employee must be acting within the scope of his employment and in furtherance of the employer's business." Id. at 501 (quoting Cardona v. Valentin, 160 Conn. 18, 22 (1970)).

Here, IBG does not dispute that the requirements with respect to respondeat superior have been sufficiently alleged. Rather, IBG's only contention is that it is not vicariously liable because Batchelar has not adequately pled negligence by its employee, Frank, so there is no underlying tort claim on which the claim of vicarious liability can be premised. Thus, because the court has concluded that Batchelar has adequately pled a claim of negligence against Frank, the motion to dismiss is being denied with respect to the claim against IBG.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss the Second Amended Complaint for Failure to State a Claim (ECF No. 75) is hereby DENIED.

It is so ordered.

Dated this 30th day of September 2019, at Hartford, Connecticut.

/s/AWT
Alvin W. Thompson
United States District Judge