UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-25359-COOKE/TORRES

KAREN SANTIAGO, *et al.*, *individually and on behalf of all others similarly situated*,

Plaintiffs,

vs.

HONEYWELL INTERNATIONAL, INC., *a Delaware corporation*,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS MATTER is before the Court on Defendant Honeywell International Inc.'s motion to dismiss the amended complaint, ECF No. 90. For the reasons stated below, the Court finds Plaintiffs have not sufficiently stated a claim for negligence or gross negligence under Florida law. Accordingly, Defendant's motion is **GRANTED** and this action is **DISMISSED with prejudice**.

FACTUAL BACKGROUND

Beginning in 2009 Florida Power & Light Company ("FPL") replaced analog electric meters with digital electric meters ("Smart Meters") in millions of Florida residences, including the homes of Plaintiffs Karen Santiago and Deborah Mozina. ECF No. 55 ¶ 12. FPL contracted Defendant Honeywell for the distribution and installation of these Smart Meters. *Id.* ¶ 13. Plaintiffs Santiago and Mozina allege that Honeywell failed to properly train its employees according to FPL's standards for the installation of these Smart Meters. *Id.* ¶¶ 21–22. Honeywell employees in turn did not adequately install these meters, causing damage—or increasing the risk of damage—to electrical infrastructure in Plaintiffs' homes. *Id.* ¶ 34

Plaintiff Santiago had a Smart Meter installed in her home on September 27, 2010. ECF No. 55 ¶ 2. Plaintiff Mozina had a Smart Meter installed in her home "in 2013 or later." *Id.* ¶ 3. According to Plaintiffs, the improper installation of Smart Meters has caused "system-

wide arcing,[1] overheating, power-surges, burning of meter enclosure components, and other damage to affected owners' property." *Id.* ¶ 33. These installations have "resulted in repairs required of customers -- repairs that should have been performed prior to Smart Meter installation." *Id.*

Plaintiff Santiago makes no specific allegations about her Smart Meter malfunctioning, or otherwise causing damage to her or her home. *See* ECF No. 55 ¶¶ 2, 63. Similarly, she does not allege she has had her meter repaired. *Id.* Plaintiff Mozina does allege that "the Smart Meter [in her] home has been providing inaccurate, inflated usage and charge amounts." *Id.* ¶ 63. She does not allege she has had her Smart Meter repaired. Additionally, Plaintiffs allege that they "and the Class are at imminent risk of suffering [additional] injury – namely, damage to their meter can and homes due to actions taken during installation[.]" *Id.* ¶ 61.

PROCEDURAL HISTORY

Plaintiff Santiago initially filed this case as a class action on December 28, 2016, ECF No. 1, and moved to certify a class on March 10, 2017, ECF No. 10. Defendant Honeywell moved to dismiss the complaint, arguing that: (1) Ms. Santiago's claim was barred by the statute of limitations; (2) Ms. Santiago lacked standing to bring the asserted claims because she had suffered no injury; (3) Ms. Santiago failed to state a claim for relief; and (4) FPL was a necessary party. ECF No. 18.

On March 16, 2018, the Court held a hearing on the motion to dismiss. ECF No. 54. The Court found the statute of limitations had expired, Ms. Santiago did not have standing to proceed as the class representative in this case, and FPL was a "necessary" party. *Id.* Accordingly, the Court dismissed the complaint, but granted Ms. Santiago leave to amend the complaint within 14 days if she could (1) find a plaintiff who had a risk of imminent injury and whose claims are not barred by the statute of limitations, and (2) add FPL as a party. ECF Nos. 51, 54.

Plaintiff Santiago timely filed an amended complaint on March 30, 2018, adding Deborah Mozina as a plaintiff. ECF No. 55. The amended complaint alleges one claim for

[1] Electrical arcing refers to a malfunction that occurs when electrical currents jump from one conductor to another. *See Cortes v. Honeywell Bldg. Sols. SES Corp.*, 37 F. Supp. 3d 1260, 1263 n.3 (S.D. Fla. 2014).

negligence and one claim for gross negligence. However, Plaintiffs did not name FPL as a defendant, and on this basis, on April 10, 2018, the Court entered an endorsed order striking the amended complaint. ECF No. 58. Plaintiffs appealed the Court's endorsed order.

On April 12, 2019, the Eleventh Circuit held this Court abused its discretion when it struck the amended complaint for failure to name FPL as a defendant. The Eleventh Circuit held that even if FPL were a required (or necessary) party, this Court needed to determine whether the litigation "should not, 'in equity and good conscience,' proceed without the absent party." ECF No. 65 at 12–13. On remand, the Court found that even if FPL were a required party under Fed. R. Civ. P. 19(a), this action could proceed in its absence. ECF No. 89 at 6.

On December 8, 2020, Defendant filed a motion to dismiss the amended complaint. ECF No. 90. Defendant argues that: (1) Plaintiff Santiago's claims are barred by the statute of limitations; (2) both Plaintiffs lack standing because neither has shown an injury-in-fact; (3) Plaintiffs fail to state a claim for either negligence or gross negligence. Plaintiffs opposed Defendant's motion. *Id.* at 2. The Court ordered additional briefing on whether—assuming the Court found the named plaintiffs had only alleged imminent injury and not actual injury—Plaintiffs had stated a negligence or gross negligence claim under Florida law. The parties submitted additional briefing on these issues. *See* ECF Nos. 123, 124, 129 and 130. On September 16, 2021, the Court held a hearing on this motion, and the motion is now ripe for adjudication.

LEGAL STANDARDS

On a motion to dismiss, the Court "accept[s] the factual allegations supporting a claim as true and draw[s] all reasonable inferences in favor of the nonmovant." *Newton v. Duke Energy Fla., LLC*, 895 F.3d 1270, 1275 (11th Cir. 2018). A plaintiff "must set forth general factual allegations that plausibly and clearly allege a concrete injury [and] mere conclusory statements do not suffice." *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1337 (11th Cir. 2021) (citations and quotations omitted).

The party invoking jurisdiction bears the burden of establishing standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Each element of the standing inquiry "must be supported in the same way as any other matter on which the plaintiff bears the burden of

proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

A defendant can move to dismiss a complaint for lack of standing by either facial or factual attack. *See Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (noting that because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction). Where a defendant facially challenges standing, the Court "must evaluate standing based on the facts alleged in the complaint, and [. . .] may not speculate concerning the existence of standing or piece together support for the plaintiff." *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (citation omitted). In a factual attack, defendant may use "material extrinsic from the pleadings, such as affidavits or testimony," *Stalley*, 524 F.3d at 1233, and the district court may dismiss "on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007) (citation omitted).

DISCUSSION

For the reasons stated below, the Court finds that Plaintiffs have established standing, but have failed to allege harm sufficient to make out a negligence or gross negligence claim under Florida law. Accordingly, the Court will dismiss these claims with prejudice.[2]

I. Plaintiffs have established standing.

Plaintiffs Santiago and Mozina, as the parties invoking this Court's jurisdiction, bear the burden of establishing standing. *Spokeo*, 136 S. Ct. at 1547. To establish standing, Plaintiffs must make out three elements: (1) an "injury in fact" that is (a) "concrete and particularized," and (b) "actual or imminent", as opposed to conjectural or hypothetical; (2) the injury must be "fairly traceable to the challenged action of the defendant"; (3) it must be "likely" and not just "speculative that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotations omitted).

[2] The Court does not address the parties' statute of limitation arguments as to Plaintiff Santiago. Even if Plaintiff Santiago is not within the statute of limitations, the parties do not dispute Plaintiff Mozina filed her claim within the statute of limitations.

The parties' dispute centers on the first two elements of the standing inquiry—whether Plaintiffs have met their burden to establish an injury in fact that is fairly traceable to the actions of Defendant.[3] *See* ECF No. 90 at 5; ECF No. 92 at 2–3. The Court finds that while Plaintiffs have not established actual injury traceable to the actions of Defendants, they have established imminent injury sufficient to establish standing.

a. Plaintiffs have not established concrete, actual injury, but they have established concrete, imminent injury sufficient for standing.

To be sufficiently concrete an injury in fact must be "real, and not abstract." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Concrete injuries can be tangible or intangible. *Id.* at 1549 "Tangible harms are the most obvious and easiest to understand; physical injury or financial loss [are] examples." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020) (en banc); *see also Tsao*, 986 F.3d at 1338 (tangible injuries include "straightforward economic injuries and more nebulous injuries, like lost time or the loss of a fraction of a vote"). Intangible injuries are harder to classify and may sometimes be concrete, but not always. *Muransky*, 979 F.3d at 926. Courts assessing the concreteness of injury engage in an analysis of "both history and congressional judgment." *Id.* In other words, courts evaluate whether the alleged injury is one that is "well-established in American courts," or one that Congress has suggested is sufficiently concrete. *Id.* at 926–27.

Even where an injury is sufficiently concrete, it must also be actual, meaning it has already happened, or imminent, meaning "the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158 (citations and quotations omitted). "[A]llegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis added) (citations and quotations omitted). Here, Plaintiffs argue they have alleged (1) four concrete, actual injuries, and (2) a substantial risk of future imminent injury. The Court analyzes each argument in turn, and finds that though Plaintiffs have not established actual injury, they have established imminent injury.

[3] Defendants do not challenge that the injuries alleged are insufficiently particularized. The Court finds that Plaintiffs have sufficiently established their alleged injuries "affect [each] plaintiff in a personal and individual way." *See Spokeo*, 136 S. Ct. at 1548 (citations omitted).

i. Plaintiffs have not met their burden to establish concrete, actual injury.

Plaintiffs identify four actual injuries they say are alleged in their amended complaint. *First*, they say "[t]he improper installation [of the meters] is [. . .] an actual, existing injury" because Defendants have "entered Plaintiffs' properties and altered their property without Plaintiffs' permission." ECF No. 91 at 7. "To the extent Honeywell's wrongful installation methods deviated from [FPL's] authorized method[s]," Defendant's actions constitute a "trespass for which damages are presumed under the law." *Id.* at 7–8. Plaintiffs cite no legal or statutory authorities to support this theory. *Id.*; *see also* ECF No. 123 at 2 (repeating this argument without legal support).

The Court doubts this alleged intangible injury, even if actual, is sufficiently concrete. As a threshold matter, Plaintiffs only allege that the Smart Meter installation in their homes was "improper" because it resulted from "inadequate[] training, supervision and inspection[.]" ECF No. 55 ¶ 4. Yet this alleged injury appears to be "a bare procedural violation, divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549 (holding a violation of a statute, without more, did not create standing). Even if Defendant violated the FPL installation protocols—say by having an improperly-trained agent install the Smart Meter—a bare protocol violation does not appear to rise to the level of a sufficiently tangible injury. And because Plaintiffs have not demonstrated that history or congressional judgment supports finding a sufficiently concrete injury here, *see Muransky*, 979 F.3d at 926, the Court finds Plaintiffs have not met their burden to show this intangible injury is sufficiently concrete.

Second, Plaintiffs argue Plaintiff Mozina suffered injury because her Smart Meter provided "inflated usage and charge amounts." ECF No. 91 at 8. This, say Plaintiffs, resulted in "economic injury." *Id.* Inflated usage and charge amounts could be a sufficiently concrete, actual injury.[4] However, "at her deposition, [Plaintiff Mozina] clarified that the inflated usage

[4] Accepting these factual allegations as true, the Court finds it reasonable to infer that as a result of these inflated charges Plaintiff Mozina could have either overpaid on her electrical bills, or disputed the proper charge on her bills. If she overpaid, then Plaintiff Mozina would have incurred an "economic injury." *See Debernardis v. IQ Formulations*, LLC, 942 F.3d 1076, 1084 (11th Cir. 2019). If she disputed the charge on her bills, then Plaintiff Mozina would have wasted time correcting these errors. *See Salcedo v. Hanna*, 936 F.3d 1162, 1173 (11th Cir. 2019) ("allegations of wasted time can state a concrete harm for standing purposes").

and charge amounts occurred *before* the installation of her Smart Meter," ECF No. 116 at 6, and Plaintiffs have provided the Court with no evidence to the contrary. *See* ECF No. 119 at 3–6 (replying to Defendant's standing arguments without presenting any evidence on—or otherwise challenging—this point); ECF No. 123 (repeating this argument but citing only the amended complaint, and ignoring Defendant's evidence to the contrary).[5] Accordingly, taking Plaintiff Mozina's undisputed testimony that these inflated charges preceded the installation of the Smart Meters, the Court finds that even if this were a sufficiently concrete actual injury, Plaintiff Mozina has not sufficiently alleged or otherwise demonstrated this injury is traceable to Defendant's installation of the Smart Meter.

Third, Plaintiffs argue that they "have suffered the diminished value of their property as the result of Honeywell's improper installation." ECF No. 91 at 10 (making this argument without citing the pleadings); *see also* ECF No. 123 at 3 (restating this argument without any citations to the pleadings). While this might amount to an injury for standing purposes, nowhere in their amended complaint do Plaintiffs Santiago or Mozina allege that their property has diminished in value, or that it is worth less than it would be if Defendant had installed their meters in compliance with FPL protocols. *See generally* ECF No. 55.

Fourth, Plaintiffs argue that they have "been exposed to the cost associated with hiring an inspector to inspect the meter can for damage." ECF No. 91 at 10. In their complaint, Plaintiffs generally allege a "high likelihood" of "damage requiring repair or replacement, which, in turn, typically requires consumers to incur additional costs of updating components of their property to current code." ECF No. 55 ¶ 1. However, neither Plaintiff Santiago nor Plaintiff Mozina have alleged they incurred any of these damages, or hired inspectors to check their property for damages—only that it is likely that they may. *Id.*; *see also* ECF No. 116 at 7 (noting Plaintiff Mozina testified that "if she had been concerned that her Smart Meter could cause damage or fire, she would have hired an electrician," but did not do so).

[5] At the motions hearing Plaintiffs' counsel stated it was inappropriate for the Court to consider the standing arguments raised in the briefing on the motion for class certification, including the deposition testimony cited therein. The Court disagrees. Both motions are before the Court, and Plaintiff bears the burden to show standing at successive stages of the litigation. *See Aaron Priv. Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1336 (11th Cir. 2019). Moreover, as stated above, the Court may consider materials outside of the amended complaint in evaluating standing. Plaintiffs have had the opportunity to respond to Defendant's arguments and the evidence presented by Defendants.

For these reasons, the Court finds Plaintiffs have not met their burden to establish concrete, actual injury.

ii. Plaintiffs have met their burden to establish concrete, imminent injury.

Plaintiffs also argue that they are at risk of concrete, imminent injury—including property damage—resulting from the improper installation of their Smart Meters. *See* ECF No 91 at 8. By failing to follow FPL protocols, say Plaintiffs, Defendants have created a "continuing condition" in Plaintiffs' homes, which "poses risk of further harm to each Plaintiff." *Id.*

In support of this, Plaintiffs allege a number of specific facts about the Smart Meter installation program, including: Defendant installed the meters in Plaintiffs' homes in violation of the FPL protocols, ECF No. 55 ¶ 4. In most installations, Defendant violated FPL installation protocols. *Id.* ¶ 21. These violations included: (1) improper training of personnel, *id.*; (2) improper inspections of the meters, *id.* ¶¶ 23-26; (3) improper supervision, *id.* ¶ 27. Plaintiffs also allege that Defendants hurried Smart Meter installations due to financial incentives. *Id.* ¶¶ 29, 31. Defendants were aware that these improper installations were causing damage to the properties of other Florida residents, requiring repairs. *Id.* ¶¶ 33, 39. Between 1.9 and 4.1% of the Smart Meters failed Defendant's internal quality control checks. *Id.* ¶ 42. According to a 2013 FPL study cited by Plaintiffs, about 78% of Smart Meter installations "were found to have some level of damage or degradation requiring repair." *Id.* at ¶ 43.

Defendant maintains that Plaintiffs' alleged injuries lack the necessary immediacy required for imminent injury. *See Alabama-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1253 (11th Cir. 2003) (injury must "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all"). Plaintiffs' respective Smart Meters were installed in 2013 (for Plaintiff Mozina) and 2010 (for Plaintiff Santiago), and the amended complaint dates to 2018. Because years had elapsed between the installations of these Smart Meters and the filing of the amended complaint, and because

Plaintiffs reported no actual damages during this time,[6] Defendant argues that Plaintiffs' alleged injuries are not sufficiently imminent. ECF No. 90 at 6.

To ascertain whether injury is imminent, the Court must ask whether, at the time the amended complaint was filed, the threated injury was either "certainly impending" or there was "substantial risk" that harm would occur to Plaintiffs. *Driehaus*, 573 U.S. at 158; *see also Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1340 (11th Cir. 2014) ("Standing is determined at the time the plaintiff's complaint is filed."). Injury is certainly impending where a plaintiff is "immediately in danger of sustaining some direct injury." *Corbett v. Transportation Sec. Admin.*, 930 F.3d 1225, 1232 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 900 (2020). Risk of injury is substantial where it is "material," "significant," or where it "poses a realistic danger" to plaintiffs. *Muransky*, 979 F.3d at 933.

Here, Plaintiffs present a borderline case. On the one hand, Plaintiffs have filed their amended complaint years after their Smart Meters were installed and have alleged no actual damage to their homes. *Cf. Cortes*, 37 F. Supp. 3d at 1263 (noting plaintiff affected by these same Smart Meter installations alleged electrical malfunction resulting in damage to property). In a sense, it does not appear they are in immediate danger of sustaining injury. On the other hand, Plaintiffs have alleged that Defendants failed to follow FPL protocols while installing these meters, and according to FPL, approximately 78% of Smart Meter installations resulted in some level of damage or degradation requiring repair. ECF No. 55 ¶ 43. The FPL study seems to show Defendant's Smart Meter installations pose a realistic danger to Plaintiffs, even if it has not yet been manifested.[7] Thus, it appears Defendant's actions have created a latent,

[6] It appears that in her deposition Plaintiff Mozina did state that two appliances stopped working after 2017, a refrigerator in her garage, and a make-up mirror. *See* ECF No. 116 at 6. However, in their amended complaint Plaintiffs have not alleged that either of these appliances stopped working because of the Smart Meter installed in 2013. Moreover, despite having the opportunity to present additional arguments or evidence to the Court on this point, Plaintiffs declined to do so, *see* ECF No. 119 at 3–6 (responding to Defendant's standing arguments), other than making a passing mention of this at the motions hearing.

[7] The Court notes that the Supreme Court has repeatedly said future injuries may be sufficiently imminent where injury is "certainly impending, *or* there is a substantial risk that the harm will occur." *See e.g.*, *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) (emphasis added) (citing *Driehaus*, 573 U.S. at 158). Even though the parties have not made this argument, it seems to the Court that the use of the disjunctive "or" favors Plaintiffs. In other words, even if Plaintiffs have not shown that injury is "certainly impending" the fact they are at a "substantial risk" of injury is sufficient for them to meet their burden to show standing at

but substantial risk that Plaintiffs will suffer harm—a risk that Plaintiffs say will only increase with time, as the Smart Meters degrade. Accordingly, even though Plaintiffs have not suffered actual damage years after the installation of their respective Smart Meters, the Court finds that—reading the complaint in the light most favorable to Plaintiffs—Defendant's installations have created a substantial risk of harm. Plaintiffs have therefore met their burden to show sufficiently imminent injury in fact, and established Article III standing.

II. Plaintiffs have not stated a negligence claim under Florida law.

Under Florida law, a negligence claim requires (1) "a duty or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct"; (2) a failure by the defendant "to conform to that duty"; (3) a "reasonably close causal connection between the nonconforming conduct and the resulting injury to the claimant" (4) "the claimant must demonstrate *some actual harm*." *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 127 (Fla. 2011) (citations and quotations omitted). While Florida courts have not required a "threshold of injury or impairment," *id.*, "[a] cause of action in negligence requires proof of actual loss or damage," *Lucarelli Pizza & Deli v. Posen Const., Inc.*, 173 So. 3d 1092, 1094 (Fla. Dist. Ct. App. 2015). Accordingly, the Court must decide whether Plaintiffs' imminent injury—which is sufficient for Article III standing—is also sufficient to meet the "some actual harm" standard under Florida negligence law. The Court finds that it is not.

Plaintiffs argue that imminent injury is sufficient to make out a negligence claim under Florida law, and point the Court to a line of medical monitoring cases. *See Petito v. A.H. Robins Co.*, 750 So. 2d 103, 105 (Fla. Dist. Ct. App. 1999). In these cases, Florida law recognizes a "cause of action in Florida despite the absence of present physical injury or symptomatic disease." *Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635, 637 (Fla. Dist. Ct. App. 2006). For a medical monitoring claim, it is sufficient that defendants' negligent actions "cause[d] a significantly increased risk of contracting serious latent diseases." *Id.* at 638. Plaintiffs ask the Court to adopt that reasoning here. But "[m]edical monitoring claims are considered non-traditional tort claims." *In re Zantac (Ranitidine) Prod. Liab. Litig.*, No. 20-MD-2924, 2020 WL 7866674, at *22 (S.D. Fla. Dec. 31, 2020). Plaintiffs cite no case where Florida courts have applied this

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this stage.

medical monitoring framework to a negligence action like the one at issue—nor do they explain why the Court should do so here.

Plaintiffs also claim a separate line of products liability cases supports their argument that imminent injury is sufficient to state a claim for negligence. But Plaintiffs misread these cases. *Nuwer v. FCA*, Case No. 20-cv-60432 at ECF No. 58 (S.D. Fla. March 30, 2021), does not support Plaintiffs' argument. There the Court found actual, economic injury due to diminished value related to the "purchase of a vehicle with a latent defect." *Id.* at 5–6. Similarly, in *In re Takata Airbag Prod. Liab. Litig.*, 193 F. Supp. 3d 1324 (S.D. Fla. 2016), "plaintiffs allege[d] diminished value or loss of resale value," *id.* at 1335. At most, these cases support an argument that if the Smart Meter installations resulted in a loss of property value, this could amount to actual harm for a negligence claim. But as explained above, although Plaintiffs repeatedly state this is an actual injury they have suffered, nowhere in their amended complaint do they allege this fact. For these reasons, the Court finds Plaintiffs have not alleged sufficient actual harm to state a claim for negligence.

III. Plaintiffs have not stated a gross negligence claim under Florida law.

To state a gross negligence claim under Florida law, Plaintiffs must allege: "(1) the existence of a composite of circumstances which, together, constitute an imminent or clear and present danger amounting to more than the normal and usual peril; (2) a showing of chargeable knowledge or awareness of the imminent danger; and (3) an act of omission occurring in a manner which evinces a conscious disregard of the consequences." *Cortes*, 37 F. Supp. 3d at 1270 (citation omitted); *see also Moradiellos v. Gerelco Traffic Controls, Inc.*, 176 So. 3d 329, 335 (Fla. Dist. Ct. App. 2015). In addition, "[t]o state a claim for gross negligence, a plaintiff must [also] establish the elements of a negligence cause of action—defendant owes a duty of care, breach of that duty, injury resulting from the breach, and damages." *Lindquist v. Jin Linxian*, No. 11-cv-23876, 2012 WL 3811800, at *4 (S.D. Fla. Sept. 4, 2012) (citations and quotations omitted); *see also*, *Giglio Sub s.n.c. v. Carnival Corp.*, No. 12-cv-21680, 2012 WL 4477504, at *15 (S.D. Fla. Sept. 26, 2012), *aff'd*, 523 F. App'x 651 (11th Cir. 2013); *Iglesias v. Jones*, No. 17-cv-21554, 2017 U.S. Dist. LEXIS 176013, at *28 (S.D. Fla. Oct. 23, 2017) (dismissing gross negligence claim where plaintiff failed to show causal connection to actual damages).

Defendant argues that Plaintiffs have failed to state a gross negligence claim because (1) Plaintiffs have suffered no actual harm; (2) "the amended complaint contains no *factual* allegations from which the Court could infer an imminent or clear and present danger, let alone Honeywell's awareness of such a danger." ECF No. 90 at 9; ECF No. 129 at 2–5. For the reasons stated above, the Court agrees that Plaintiffs have not alleged actual harm. Accordingly, the Court finds Plaintiffs have not stated a claim for gross negligence under Florida law.

IV. The Court will dismiss the negligence and gross negligence claims with prejudice.

The Court finds dismissal of the negligence and gross negligence claims with prejudice is appropriate here. A district court's discretion to dismiss a complaint without leave to amend is restricted by Fed. R. Civ. P. 15(a) "which directs that leave to amend shall be freely given when justice so requires." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (citations and quotations omitted). Generally, "where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Id.* (citations omitted). However, district courts are not required to "grant counseled plaintiffs more than one opportunity to amend a deficient complaint [. . .] where a counseled plaintiff has failed to cure a deficient pleading after having been offered ample opportunity to do so." *Eiber Radiology, Inc. v. Toshiba Am. Med. Sys.*, 673 F.App'x 925, 930 (11th Cir. 2016).

Here, both the Court and Defendant put Plaintiffs on notice that no actual injury had been pled, and that this may not be sufficient to state a negligence or gross claim under Florida law. Defendant initially raised this issue in briefing on the first motion to dismiss, stating that Plaintiff Santiago failed to allege "actual damage," sufficient to make out a negligence or gross negligence claim. ECF No. 18 at 7, 9. During the hearing on the first motion to dismiss, the Court noted that Plaintiffs needed "some evidence of injury" for their class representatives to state a negligence claim. ECF No. 54 at 12. The Court expressed doubt that Plaintiffs had sufficiently alleged injury, let alone actual damages. *Id.* The Court then granted leave to amend the complaint. *Id.* at 33.

On December 12, 2020, Defendant filed a second motion to dismiss, again arguing that Plaintiffs had not pled actual damages as required to state a claim for negligence and

gross negligence under Florida law. ECF No. 90. At this point, Plaintiffs could have sought leave to amend, but instead, decided to oppose Defendant's motion to dismiss. *See* ECF No. 91; *see also Sanlu Zhang v. Royal Caribbean Cruises, Ltd.*, No. 19-20773-CIV, 2020 WL 1472302, at *2 (S.D. Fla. Mar. 26, 2020) (quoting *Eiber Radiology*, 673 F. App'x at 930) ("The Court will not now afford [plaintiffs] a second (or third) bite of that apple where [plaintiffs] declined 'to follow the well-trodden procedural path toward amendment.'"). Accordingly, the Court finds Plaintiffs were on notice of the deficiencies in their complaint, had ample opportunity to cure their deficient pleading, and failed to do so. The Court thus finds it appropriate to now dismiss the negligence and gross negligence claims with prejudice.

CONCLUSION

For the foregoing reasons, the Court finds Plaintiffs have failed to state a claim for negligence and gross negligence under Florida law. Accordingly, the motion to dismiss is **GRANTED** and these claims are **DISMISSED with prejudice**. The Clerk shall **CLOSE** this case.

DONE and ORDERED in Chambers, in Miami, Florida, this 29th day of September 2021.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
Jonathan Goodman, U.S. Magistrate Judge
Counsel of record