UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-20429-CIV-ALTONAGA/O'Sullivan

LISSYS CORTES, *et al.*,

Plaintiffs,

vs.

HONEYWELL BUILDING SOLUTIONS SES CORPORATION, *et al.*,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court upon Plaintiffs, Lissys Cortes ("Cortes") and David Knight's ("Knight['s]") (collectively, "Plaintiffs[']") Motion for Class Certification ("Motion") [ECF No. 61], filed on August 1, 2014. Defendants, Honeywell Building Solutions SES Corporation ("Honeywell Building"), and Honeywell International, Inc. ("Honeywell International") (collectively, "Defendants") filed a corrected Opposition . . . ("Response") [ECF No. 76] on August 19, 2014; Plaintiffs filed their Reply . . . ("Reply") [ECF No. 82] on August 29, 2014. On September 19, 2014, the Court held a hearing ("Hearing") [ECF No. 86] on the Motion. The Court has carefully considered the parties' written submissions, oral arguments, and applicable law.

I. BACKGROUND[1]

This case involves claims by Cortes and Knight in connection with Defendants' alleged negligence and gross negligence in replacing analog electric meters with Smart Meters in

[1] The background summarizes the facts alleged in the Amended Class Action Complaint ("Amended Complaint") [ECF No. 20]. A fuller background of this litigation can be found in the Order of August 12, 2014 ("August 12 Order") [ECF No. 68], denying Defendants' motion to dismiss. Additional facts not contained in the pleading but relevant to the class certification request are addressed in the analysis section of this Order, Part III, *infra*.

Plaintiffs' homes. (*See* Am. Compl. 22–29).[2] In 2009, Florida Power & Light ("FPL" or "FP&L") began replacing customers' analog electric meters with so-called "Smart Meters." (*See id.* ¶ 17). FPL formulated, deployed, and managed the Smart Meter installation plan and hired Defendants to perform the installations. (*See id*. ¶ 23).

The electric meter, property of FPL, is housed inside an enclosure or "box" known as a "meter can" that connects the meter to the electrical infrastructure of a residential customer's home. (*Id.* ¶ 15). FPL owns and is responsible for all Smart Meters, while homeowners own and are responsible for the meter can and their side of the connection — all of the wiring in the home that connects to the meter. (*See id.* ¶¶ 7, 15, 17). An electric meter connects to the home via "male" metal prongs, which connect into "female" receptors inside a meter can. (*See id.* ¶ 16). Before the advent of Smart Meters, the male and female meter connections had varying dimensions, requiring female receptors to be properly matched with male connectors. (*See id.*). FPL's installation plan required replacing existing male connectors with various iterations of Smart Meter connectors, each designed differently and possessing different male connectors. (*See id*. ¶¶ 17, 20).

One or more of the Defendants entered Cortes's property and replaced her working analog electric meter with a Smart Meter. (*See id*. ¶ 2). "As a result of improper installation of the Smart Meter, [] Cortes suffered arcing in her meter and resulting economic damages," including "the cost of repair or replacement of property and the cost of updating components of her property to current code due to reasonably necessary repair work caused by the arcing . . . ." (*Id.* ¶ 3 (alterations added)). The damage to the meter and associated equipment was not on the "Customer's side of the point of delivery." (*Id.* ¶ 39). Cortes was

[2] When citing to Plaintiffs' Amended Complaint, Motion, and Reply, the Court uses the page numbers provided by the Court's electronic case management database ("CM/ECF").

> forced to hire an electrician who, on or about October 11, 2013, removed the existing meter blocks and installed new meter terminals on A and B phases, installed new lug terminals, installed new feeder wires, piped, wired and installed a new dual rod grounding system, and charged for the requisite permitting and inspection fees.

(*Id.* ¶ 3). Cortes contends the arcing damaged her air conditioner and pool motor. (*See id.*).

One or more of the Defendants similarly entered Knight's property and replaced his working analog electric meter with a Smart Meter. (*See id.* ¶ 4). "As a result of improper installation of the smart meter, [] Knight suffered arcing in his meter can[] and resulting economic damages." (*Id.* ¶ 5 (alterations added)). "He was forced to hire an electrician who, on or about October 22, 2013, removed existing burnt lug on 'A' phase for line side, installed a new meter lug, replaced a neutral lug, and charged the requisite permitting and inspection fees." (*Id.*). The damage to the meter and associated equipment was not on the "Customer's side of the point of delivery." (*Id.* ¶ 39).

Plaintiffs state one count of negligence and one count of gross negligence against each Defendant. (*See id.* 22–29). Plaintiffs allege Defendants breached their duties "to install the Smart Meters in a competent, safe[,] and reasonable manner" and "warn of any risks associated with improper installation of the Smart Meters." (*Id.* ¶¶ 55–56 (alteration added); *see id.* ¶¶ 61–62). Plaintiffs claim Defendants' installation practices were unsafe and improper:

> Defendants' employees or agents would strike the old meter with extreme force to knock the meter loose. Then they would strike the Smart Meter with extreme force to install it in place of the old meter. What should take five to seven minutes was taking a mere 90 seconds, and, as a consequence, the "Female" receptors would bend and expand the [sic] during removal of the old meter and the "Female" receptors would crush during the installation of the new Smart Meter.

(*Id.* ¶ 36 (alteration added)).

Plaintiffs further allege Defendants breached their duty of care with gross negligence, "engag[ing] in a course of conduct such that the likelihood of injury to other persons or property

was known by Defendant[s] to be imminent or clear and present . . . ." (*Id.* ¶ 69 (alterations added); *see id.* ¶ 75). "Defendants' improper installation of the Smart Meters is the only reason Plaintiffs and every putative class member suffered the damages they did." (*Id.* ¶ 6). Plaintiffs sought reimbursement for their damages from FPL, but FPL denied the request asserting the homeowner, rather than FPL, "is required to bear the cost of the damage because it occurred on the [homeowner]'s side of the connection. . . ." (*Id.* ¶ 7 (alterations added)).

II. LEGAL STANDARD

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (citation and internal quotation marks omitted). "Questions concerning class certification are left to the sound discretion of the district court." *Cooper v. Southern Co.*, 390 F.3d 695, 711 (11th Cir. 2004) (citations omitted), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006)). With this "great power comes great responsibility; the awesome power of a district court must be 'exercised within the framework of [Federal Rule of Civil Procedure] 23.'" *Klay v. Humana, Inc.*, 382 F.3d 1241, 1251 (11th Cir. 2004) (alteration added) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)). Thus, to be entitled to class certification, the party seeking certification must have standing and meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as the requirements of at least one subsection of Federal Rule of Civil Procedure 23(b). *See id.* at 1250 (citations omitted). "The burden of proof to establish the propriety of class certification rests with the advocate of the class." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009) (citation and internal quotation marks omitted).

Rule 23(a) provides one or more members of a class may sue as a representative on behalf of all members if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

The class must also satisfy one of the three additional requirements of Rule 23(b). Plaintiffs seek class certification pursuant to Rule 23(b)(3). (*See* Mot. 14).[3] Certification is available if the Court finds "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). "The predominance inquiry . . . is far more demanding than Rule 23(a)'s commonality requirement." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (alteration added; citation and internal quotation marks omitted).

In examining whether the party seeking certification has satisfied the requirements of Rule 23, the Eleventh Circuit has counseled, "Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003) (citation omitted). Indeed, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, . . . and . . . certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied . . . ." *Wal-Mart*, 131 S. Ct. at 2551 (alterations added; internal citations and quotation marks omitted). "Frequently that 'rigorous analysis' will

[3] While Plaintiffs also seek certification under Federal Rule of Civil Procedure 23(b)(2) (*see* Mot. 14), they do not support their request with any argument (*see generally id.*, Reply), as Defendants point out in the Response (*see* Resp. 18 n.17). Because the burden of class certification lies with Plaintiffs, *see Vega*, 564 F.3d at 1265 (citation omitted), the Court rejects without further discussion the unsupported attempt to certify the class under Rule 23(b)(2).

entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.*

III. ANALYSIS

Defendants assert class certification is improper for a number of reasons. They claim Plaintiffs do not meet any of the Rule 23(a) prerequisities (*see* Resp. 12–18) or the Rule 23(b)(3) requirements of predominance and superiority (*see id.* 18–20). Defendants say the need to determine whether individual customers' meters were installed properly "will necessarily involve individualized inquiries," and the answers to questions about the cause of individuals' damages would not aid the Court in resolving the same questions as to other potential class members. (*Id.* 11).

A. Manageability of Class Definition

Initially Defendants assert the Court cannot certify the putative class because Plaintiffs' definition "requires impermissible, individualized inquiries to determine the members of the class." (Resp. 13). They argue three "core questions" must be answered before being able to determine class membership, and the determination of these questions does not provide a "simple, objective test for ascertaining class members . . . ." (*Id.* 14 (footnote call number omitted)). Plaintiffs insist the proposed classes are adequately defined and ascertainable because a specific number of customers had Smart Meters installed by Honeywell, reported problems after the six-month period following installation, and did not receive assistance with the repairs. (*See* Mot. 17). Plaintiffs claim the "only unknowns are" the number of customers who did not report unreimbursed expenses to repair their meter enclosures after the Smart Meter installation, as well as those who will suffer damages in the future. (*Id.*).

"Before analyzing the Rule 23(a) requirements, or as part of the numerosity inquiry, a court must determine whether the class definition is adequate." *O'Neill v. The Home Depot*

U.S.A., Inc., 243 F.R.D. 469, 477 (S.D. Fla. 2006) (citation omitted); *see also Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014) (per curiam) ("One threshold requirement is not mentioned in Rule 23, but is implicit in the analysis: that is, the plaintiff must demonstrate that the proposed class is adequately defined and clearly ascertainable." (footnote call number, citation, and internal quotation marks omitted)). "A vague class definition portends significant manageability problems for the court." *O'Neill*, 243 F.R.D. at 477 (citation and internal quotation marks omitted). "An identifiable class exists if its members can be ascertained by reference to objective criteria. . . . The analysis of the objective criteria also should be administratively feasible. Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual inquiry." *Bussey*, 562 F. App'x at 787 (alteration added; footnote call number, internal citations, and quotation marks omitted).

Plaintiffs bring this action on behalf of themselves and all others similarly situated (the "Potential Class"). (*See* Am. Compl. ¶ 40). In the Motion, Plaintiffs define the Potential Class as:

> All Florida Power & Light customers in Florida who had a Smart Meter installed at their property after September 2009 and who have suffered or will suffer unreimbursed economic loss arising from the Defendant's [sic] improper installation of the Smart Meter. Such loss consists of the expense of hiring an electrician, the expense of repair or replacement of their meter enclosure, meter enclosure components, wiring into and out of the meter enclosure, and the expense of obtaining necessary permits to undertake such repairs, and upgrade their system as needed in order to obtain local municipal approval of the repair work.

(Mot. 1).

Defendants claim membership in the proposed class requires a determination whether the Smart Meter was improperly installed; whether the customer had unreimbursed economic loss; and whether the loss was caused by the improper installation. (*See* Resp. 10). Because Plaintiffs

bring claims for negligence and gross negligence (*see generally* Am. Compl.), they must prove causation, *see Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1262 (11th Cir. 2001) (citation omitted). To "establish proximate cause in Florida, the court must find both a cause in fact (that the injury would not have occurred 'but for' the negligent act) and that the injury was a reasonably foreseeable result of the act." *Zinn v. United States*, 835 F. Supp. 2d 1280, 1317 (S.D. Fla. 2011) (citations omitted). Therefore, to establish liability as to each Potential Class member, Plaintiffs must show the damage each sustained was not the result of other causes, such as poor wiring in the home. (*See* Resp. 7 (collecting potential causes of damage to a meter can)).

The Potential Class definition impermissibly requires a finding of liability *and* causation at the class certification stage. For the Court to determine membership, it would also need to determine the validity of putative class members' claims and defenses to those claims. The focus on individuals' experiences — merely to determine membership in the class — would frequently require the putative class members to self-report electrical problems started occurring *after* the Smart Meters were installed. As such, "the only evidence likely to be offered in many instances will be the putative class member's uncorroborated claim that he or she" observed electrical problems after the Smart Meter installation. *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003). This self-interested reporting, often unverifiable but for the Plaintiffs' own testimony,[4] implicates Defendants' due process rights, and "individualized mini-trials would be required even on the limited issue of class membership." *Id.*

The repeated use of these procedures would result in inefficient resolution of the claims, defeating one of the central purposes of the class action tool. *See McGuire v. Int'l Paper Co.*, No. 1:92-CV-593BRR, 1994 WL 261360, at *5 (S.D. Miss. Feb. 18, 1994) (finding the need for

[4] While major electrical issues may have been documented by objective proof, Plaintiffs rely on numerous instances of minor issues unlikely to have been documented at the time of occurrence. (*See, e.g.*, Mot. 12 (noting Cortes observed "her microwave and oven clocks suddenly failing to keep time, her lights occasionally growing dim and then bright, and her microwave shutting off and on without command")).

many individual hearings to determine a subclass "would create insurmountable administrative problems. The judicial and litigation costs of making these threshold determinations would eliminate any possibility that a class action would yield any of its intended efficiencies."). At the Hearing, Plaintiffs contended these determinations should not defeat class certification because Defendants would be liable for damages caused by improper installation or by a failure to discover preexisting conditions in the meter can. But even assuming this is the case, there are still numerous other potential causes of meter can damage wholly unrelated to the Smart Meter installation. (*See* Reply 6 (noting, "Plaintiffs do not dispute that there are a variety of reasons which could cause damage to customers' meter cans" but arguing other reasons are not "plausible" in this context)).

The Court further finds the definition of the Potential Class impermissibly vague in its inclusion of "customers . . . who have suffered *or will suffer* unreimbursed economic loss . . . ." (Mot. 1 (alterations and emphasis added)). Plaintiffs request a class to be certified of individuals who, at any point in the future, may suffer economic losses as a result of the Smart Meter installations. Apart from the considerations of causation already noted in this Order, this proposed subset of class membership is presently impossible to determine. Accordingly, the Court finds the definition of the Potential Class is not manageable, and certification is denied on this ground.

B. Rule 23(a)

Even if Plaintiffs' proposed class definition was adequate, Plaintiffs must also satisfy the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. The Court examines the requirements of numerosity and adequacy, and given the conclusion as to these requirements, does not address the requirements of commonality and typicality.

1. Numerosity

With regard to the numerosity requirement, Plaintiffs must establish the class is so numerous that joinder of all members is impracticable. *See* FED. R. CIV. P. 23(a)(1). As a general rule, a group of more than 40 satisfies the numerosity requirement of Rule 23, a group of fewer than 21 does not, and the numbers in between are subject to judgment based on additional factors. *See Vega*, 564 F.3d at 1267. "To meet this requirement, plaintiffs need not prove the exact size of the proposed class, but rather need demonstrate only that the number is exceedingly large, and joinder impracticable." *In re Infant Formula Antitrust Litig.*, No. MDL 878, 1992 WL 503465, at *3 (N.D. Fla. Jan. 13, 1992) (citation omitted). In essence, a plaintiff seeking to certify a class must make a showing with factual support that the numerosity requirement will be satisfied. *Vega*, 564 F.3d at 1267.

Defendants contend Plaintiffs have merely speculated about the numbers of putative class members and lack "evidence that even a single FPL customer meets the proposed class definition . . . ." (Resp. 13). Plaintiffs make reference to 603 FPL customer inquiries involving alleged property damage related to Smart Meter installation arising more than six months after installation (*see* Mot. 5, 16), but they fail to indicate whether *any* of these 603 inquiries involve "unreimbursed economic loss," a requirement contained in the proposed class definition (*id.* 1). Plaintiffs say a "presently unknown number" of customers (1) had to make repairs at their own expense or (2) suffered damages but did not complain to Honeywell or FPL. (*See id.* 5 (footnote call numbers omitted)). And they point to figures provided by Kent Crook ("Crook"), the owner of Wiremasters Electric, Inc., indicating Crook was hired by "approximately 120" individuals beginning in 2010 to repair damaged meter cans, an allegedly higher rate than before the Smart

Meters' installation. (*Id.* 10; *see also id.* 16).[5]

Nothing in Plaintiffs' factual showing indicates these 120 customers' problems were *caused* by the Smart Meter installation — as opposed to any number of other factors — or involved unreimbursed economic loss, two prerequisites to membership in the proposed class. Thus, these assertions do not come close to showing the number of plaintiffs is large enough to satisfy the numerosity requirement. *See Hugh's Concrete & Masonry Co. v. Southeast Pers. Leasing, Inc.*, No. 8:12-CV-2631-T-17AEP, 2014 WL 794317, at *2 (M.D. Fla. Feb. 26, 2014) ("[T]he Court cannot find Plaintiff's bases for numerosity go beyond mere speculation, bare allegations, or unsupported conclusions. Thus, Plaintiff fails the numerosity requirement." (alteration added)). The Court would "abuse[] its discretion by finding the numerosity requirement to be satisfied . . . when the record is utterly devoid of any showing that the . . . class . . . is so numerous that joinder of all members is impracticable." *Vega*, 564 F.3d at 1267–68 (alterations added; footnote call number, citation, and internal quotation marks omitted).[6]

[5] The Court places little weight on the opinions of Crook, who is not a disclosed expert in this matter. (*See* Reply 10 ("Crook, meanwhile, did not have to be listed as an expert witness to opine on the merits of Plaintiffs' claims.") (emphasis omitted)). Crook did not evaluate the cause of the named Plaintiffs' electrical problems by, for instance, taking a large role in the repairs. (*See* Resp. 12 n.2). He did not even go to Knight's residence for the repair (*see* Deposition of Kent D. Crook 110 [ECF No. 61-17]), and his testimony thus does not "confirm[] the obvious: That the cause of [] Knight's electrical problems was the negligent installation of the Smart Meter," as Plaintiffs contend. (Mot. 12 (alterations added; footnote call number omitted)). His deposition testimony is of little help in determining the cause of damages, if any, to FP&L customers in general.

[6] Plaintiffs state, "Based upon Defendants' own review, which Plaintiffs' [sic] do not at all concede, Defendants cannot dispute that approximately 45 of [] Crook's meter can repairs are members of Plaintiffs' putative class." (Reply 10 (alterations added)). Where the number 45 comes from is unexplained; it is not mentioned in the Motion. (*See generally* Mot.). It may reference the statement in the Response noting over half of the "jobs" identified by Wiremasters had nothing to do with meter can repair (*see* Resp. 12 n.13), but how the number 45 is derived from this statement is not apparent. And, oddly, the Reply appears to question the very calculation on which it relies for the proposition there are 45 potential class members. (*See* Reply 10 (noting Plaintiffs "do not at all concede" Defendants' review of the figures)). The Court thus does not accept this unsupported and entirely confusing statement in the numerosity analysis. Regardless, Plaintiffs point to nothing indicating any of Crook's 120 repairs involve unreimbursed economic loss. (*See* Mot. 15–17; Reply 9–10).

Plaintiffs appear to plan on identifying additional putative class members through data they obtain from FPL (*see* Mot. 16, Reply 9), but the existence of "outstanding discovery motions by which Plaintiff[s] may acquire discovery and relevant materials to satisfy this requirement" is insufficient to show numerosity at *this* stage. *Hugh's Concrete & Masonry Co.*, 2014 WL 794317, at *3.[7] Thus the fact that "Defendants do not refute that Plaintiffs may ascertain the number of FP&L customers whom FP&L advised that permanent repair was required" (Reply 9), is immaterial, as the burden does not lie with Defendants. Plaintiffs do not establish the requirement of numerosity, and class certification is denied on this ground.

2. Adequacy

Rule 23(a) also requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

> Rule 23(a)(4) requires that the representative party in a class action "must adequately protect the interests of those he purports to represent." . . . This "adequacy of representation" analysis "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." . . . If substantial conflicts of interest are determined to exist among a class, class certification is inappropriate. . . . Significantly, the existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a "fundamental" one going to the specific issues in controversy. . . . A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class. In such a situation, the named representatives cannot "vigorously prosecute the interests of the class through qualified counsel" because their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members.

Valley Drug Co., 350 F.3d at 1189 (alterations added; internal citations omitted). An adequate

[7] The Court is not persuaded otherwise by Plaintiffs' Notice of Filing . . . ("First Notice") [ECF No. 84]. The First Notice is not properly before the Court, as after a movant files a reply, "[n]o further or additional memoranda of law shall be filed without prior leave of Court. All materials in support of any motion, response, or reply, including affidavits and declarations, shall be served with the filing." S.D. FLA. L.R. 7.1(c) (alteration added). Even were it properly before the Court, however, the FP&L correspondence attached as an exhibit [ECF No. 84-1] explicitly states FP&L "could not determine . . . the reason that a damaged meter can letter was issued . . . ." (*Id.* 1 (alteration added)). The correspondence thus fails to indicate numerosity as to the Potential Class.

class representative must be one willing to vigorously litigate the action on behalf of the class. *See Clausnitzer v. Fed. Express Corp.*, 248 F.R.D. 647, 657 (S.D. Fla. 2008).

Defendants contend named Plaintiffs Knight and Cortes have legal and factual issues unique to them that will distract them from representing the class, as there is "reason to believe Plaintiffs are not even in the class they seek to represent." (Resp. 17). But according to Plaintiffs, Crook opined the damage to the meter cans was caused by improper Smart Meter installations, meaning Knight and Cortes fall into the putative class. (*See* Reply 12). A plaintiff cannot "assert with forthrightness and vigor those interests of other class members that he does not share and in which he has no stake. Indifference as well as antagonism can undermine the adequacy of representation." *Lyons v. Georgia-Pac. Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (footnote call number and internal quotation marks omitted). As stated in Part III.B.1, *supra*, Plaintiffs fail to make a sufficient factual showing they are even in the class they seek to represent, and for the same reason they fail to show they are adequate representatives. Plaintiffs' Reply fails to meaningfully address this contention (*see* Reply 12 (generally noting "Neither Plaintiff shows any indifference or antagonism to undermine the adequacy of representation")), and they thus do not make the requisite showing of adequacy under Rule 23(a)(4).

C. Rule 23(b)(3)

Even were they able to meet the Rule 23(a) prerequisites, Plaintiffs must meet the requirements of Federal Rule of Civil Procedure 23(b)(3) that common issues of law or fact predominate over individual issues, making class treatment superior to other methods of adjudication. Rule 23(b)(3) requires finding both (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating

the controversy." FED. R. CIV. P. 23(b)(3); *see also Vega*, 564 F.3d at 1277. These requirements are known as predominance and superiority. *See Vega*, 564 F.3d at 1265 (citations omitted).

Predominance "is perhaps the central and overriding prerequisite for a Rule 23(b)(3) class." *Id.* at 1278 (citation omitted). "Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Klay*, 382 F.3d at 1255 (alterations, citation, and internal quotation marks omitted). "Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3)." *Id.* (citing *Perez*, 218 F.R.D. at 273). "The predominance inquiry requires an examination of the claims, defenses, relevant facts, and applicable substantive law, to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant." *Bussey*, 2014 WL 1302658, at *5 (alteration, citations, and internal quotation marks omitted). "Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000) (citations omitted).

As for predominance, Plaintiffs cite numerous "questions of law and fact that are *common* to the claims of the Plaintiffs and the entire Class." (Mot. 21 (emphasis added)). However, they offer little beyond their assurances these common issues *predominate* over individualized inquiries. (*See id.* 21–23). Defendants assert the need to show they were the "'proximate cause of [Plaintiffs'] injuries,'" and the fact "there are 'numerous sources' that could have caused the injury" preclude a finding of predominance. (Resp. 20 (quoting *Lankford v. Carnival Corp.*, No. 12-cv-24408-CMA, at *21 [ECF No. 280] (S.D. Fla. July 25, 2014)

(alteration in original))).

"Under the law of the Eleventh Circuit, the combination of significant individualized questions going to liability and the need for individualized assessments of damages precludes Rule 23(b)(3) certification." *In re Conagra Peanut Butter Products Liab. Litig*., 251 F.R.D. 689, 698 (N.D. Ga. 2008) (citation omitted). While Defendants may well have employed similar methods of training employees and installing the Smart Meters, those actions are but one component of the tort inquiry. Plaintiffs also need to prove a breach of duty, if any, was the proximate cause of the damages. The proximate cause determinations would predominate over the determination of the common issue of Defendants' conduct, due to the numerous potential causes of meter can damage. (*See* Resp. 7 (collecting potential causes of damage)). The mere fact installers were negligent in installations does not mean that negligence caused any damages.

Certainly, Defendants' allegedly "improvident training, supervision[,] and installation of Smart Meters" will play a similar role in all of the putative class members' claims. (Mot. 22 (alteration added)). But assuming negligence is proven, Plaintiffs "would still have the bulk of their cases to prove," namely injury in fact and causation. *Neenan v. Carnival Corp*., 199 F.R.D. 372, 376 (S.D. Fla. 2001) (citation and internal quotation marks omitted); *see also In re 'Agent Orange' Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 165 (2d Cir. 1987) ("The relevant question, therefore, is not whether Agent Orange has the capacity to cause harm, . . . but whether it *did* cause harm and to whom. That determination is highly individualistic [] and depends upon the characteristics of individual plaintiffs (*e.g.* state of health, lifestyle) and the nature of their exposure . . . ." (alterations added; emphasis in original)). It is thus not true "Plaintiffs' proof will be the same regardless of class size or composition." (Reply 13). The fact-finder will need to make specific determinations of proximate causation for additional Plaintiffs, which would predominate over a class-wide determination of negligence.

Finally, Plaintiffs fail to show a class action is the superior method of adjudicating this controversy. Concerns about the need for individualized inquiries — which, as previously noted, are present in this case — affect the superiority inquiry. *See Perez*, 218 F.R.D. at 273 ("Severe manageability problems are a prime consideration that can defeat a claim of superiority." (citation omitted)). These individual determinations would defeat any efficiencies potentially obtained by resolution of class-wide issues, and they counsel against finding a class action is superior to other methods of adjudicating this controversy. Plaintiffs assert a class action would promote "judicial economy and the convenience of the parties," arguing a resolution of "the legal issues in this matter as part of a class action would lead to economies of time, effort[,] and expense for the parties and the Court." (Mot. 24 (alteration added)). Certainly combining any related lawsuits into a class action could save judicial economy and effort, by, for instance, requiring only one jury to be selected. But a reduction of total time spent in seating a jury is only one aspect of the inquiry, and the necessity to make repeated proximate cause determinations has the potential to make a class action laborious and drawn-out. Plaintiffs fail to show the proposed class action is the superior method for adjudicating this controversy.

IV. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 61]** is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 24th day of September, 2014.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record