**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 19-10030-CIV-MARTINEZ/AOR**

PAMELA and STUART KESSLER, H/W,

*Pro se* Plaintiffs,

v.

CITY OF KEY WEST, a Florida Municipality, *et al.*,

Defendants.
_____/

**REPORT AND RECOMMENDATION**

THIS CAUSE came before the Court upon Defendants City of Key West ("City") and Ronald Ramsingh, George Wallace, James K. Scholl, Greg Veliz, Jim Young, Doug Bradshaw, Karen M. Olson, and Mark Tait's (collectively, "Individual City Defendants") (together, "City Defendants") Motion to Dismiss First Amended Complaint (hereafter, "Motion to Dismiss") [D.E. 27]. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636 by the Honorable Jose E. Martinez, United States District Judge [D.E. 8]. For the reasons stated below, the undersigned respectfully recommends that the Motion to Dismiss be GRANTED.

**PROCEDURAL AND FACTUAL BACKGROUND**

On February 25, 2019, *pro se* Plaintiffs Pamela Kessler ("Mrs. Kessler") and Stuart Kessler ("Mr. Kessler") (together, "Plaintiffs" or the "Kesslers") filed their initial Complaint against the City Defendants; a City contractor, Douglas N. Higgins Inc. ("Higgins"); and Higgins' regional manager, Paul R. Waters ("Waters") [D.E.1]. The case concerns the docking of Plaintiffs' floating home (or liveaboard vessel) at the City's Marina at Garrison Bight ("Garrison Bight Marina"); and the City's actions with respect to Slip 16 Sailfish Pier, where the liveaboard vessel was docked

(hereafter, "Garrison Bight Slip"). Id. at 2-7. Specifically, Plaintiffs alleged that the City Defendants: wrongfully commenced a code violation proceeding and an eviction proceeding against them; negligently caused Plaintiffs' liveaboard vessel to sink in the aftermath of Hurricane Irma; and thereafter, wrongfully terminated Plaintiffs' lease agreement with the City pursuant to which Plaintiffs had docked their liveaboard vessel at the Garrison Bight Slip for 14 years ("Lease Agreement"), and wrongfully removed the remainder of Plaintiffs' personal property from the Garrison Bight Slip. Id. at 2-7; ¶¶ 114-19.

Plaintiffs also filed a Motion for Temporary Restraining Order, Preliminary Injunction, and Sanctions against the City Defendants (hereafter, "Motion for Injunctive Relief") [D.E. 3]. On April 8, 2019, the undersigned held an evidentiary hearing on the Motion for Injunctive Relief [D.E. 21]. At the evidentiary hearing, Plaintiffs advised the Court that they were only seeking injunctive relief against the City Defendants with respect to Counts 1, 4, and 7 of the Complaint. See Report and Recommendation [D.E. 22 at 2]. Following the evidentiary hearing, the Motion for Injunctive Relief was denied because, *inter alia*, Plaintiffs were unable to demonstrate a substantial likelihood of success as to the aforementioned Counts. Id. at 8-9; see also Order Adopting Magistrate Judge's Report and Recommendation [D.E. 31].

On May 13, 2019, Plaintiffs filed their eight-count First Amended Complaint (hereafter, "Amended Complaint") [D.E. 26]. The allegations and causes of action in Plaintiffs' Amended Complaint are substantially similar to those found in their initial Complaint, with additional allegations that the City Defendants, following the termination of the Lease Agreement, wrongfully shut down Plaintiffs' utility accounts for the Garrison Bight Slip and wrongfully moved another liveaboard vessel into the Garrison Bight Slip. Compare Am. Compl. [D.E. 26] with Compl. [D.E. 1]. Additionally, in their Amended Complaint, Plaintiffs incorporate by reference

Exhibits 1-8 to their Initial Complaint. See Am. Compl. [D.E. 26 at 2]. As a result, those documents are relevant to the City Defendants' Motion to Dismiss. See Done v. HSBC Bank USA, No. 09-CV-4878, 2010 WL 3824142, at *2 (E.D.N.Y. Sept. 23, 2010) ("In reviewing a motion to dismiss, a court may consider, *inter alia*, (1) documents that are incorporated by reference into the complaint, and (2) documents that, even if not incorporated by reference, the defendant has notice of and that are 'integral' to the complaint.").

The City Defendants' Motion to Dismiss is directed at the following Counts of the Amended Complaint:

- Count 1 – Contempt of Orders and Rules of Federal Court, as to the City Defendants
- Count 4 – 42 U.S.C. § 1983 (Due Process Self-Help Eviction, Violation of the Takings Clause), as to the City
- Count 5 – 42 U.S.C. §§ 1983, 1985 (Due Process Self-Help Eviction), as to the Individual City Defendants
- Count 6 – 42 U.S.C. § 1983 (Due Process, Failure to Adhere to Federal Court Rules, Procedures for Code Enforcement), as to the City Defendants
- Count 7 – 42 U.S.C. §§ 1983, 1985 (Equal Protection), as to the City Defendants
- Count 8 – Negligence, Strict Liability in Tort, Increased Risk of Harm, as to the City Defendants

See Am. Compl. [D.E. 26 at 23-24, 27-39].[1]

The City Defendants move to dismiss these Counts for failure to state a federal claim upon which relief can be granted. See Mot. to Dismiss Am. Compl. [D.E. 27 at 1]. The undersigned finds the City Defendants' arguments persuasive and recommends that the Motion to Dismiss be granted.

[1] Counts 2 and 3 are directed at Defendants Higgins and Waters. Id. at 24-27. There is no proof of service in the record as to these Defendants. See Fed. R. Civ. P. 4(l)(1) ("Unless service is waived, proof of service must be made to the court.").

The undersigned will address each pertinent cause of action below.

**STANDARD OF REVIEW**

Under Rule 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "In ruling on a [Rule] 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff." Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010) (citing Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003). "The Court does not view each fact in isolation . . . but considers the complaint in its entirety." Leader Glob. Sols., LLC v. Tradeco Infraestructura, S.A. DE C.V., 155 F. Supp. 3d 1310, 1315 (S.D. Fla. 2016) (citing Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

"To survive a Rule 12(b)(6) motion to dismiss, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face." Michel v. NYP Holdings, Inc., 816 F.3d 686, 694 (11th Cir. 2016) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 556). While detailed factual allegations are not necessary, "[a] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." Twombly, 550 U.S. at 545 (citations and quotations omitted). "[U]nadorned, the-defendant-unlawfully-harmed-me accusation[s]" are insufficient to state a claim for relief. Iqbal, 556 U.S. at 678.

"[*P*]*ro se* pleadings are held to a less strict standard than pleadings filed by lawyers and thus are construed liberally." Alba v. Montford, 517 F.3d 1249, 1252 (11th Cir. 2008) (citing Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir.1998)). "In evaluating a *pro se* plaintiff's complaint, the Court can examine other pleadings, including responses to motions, to understand the full scope of plaintiff's claim." Jimenez-Tapia v. Santander Bank PR, 257 F. Supp. 3d 193, 196 (D.P.R. 2017); see also Richardson v. United States, 193 F.3d 545, 548 (D.C. Cir. 1999). However, "[the] [Court] will not serve as de facto counsel or rewrite an otherwise deficient pleading in order to sustain an action." Ward v. Select Portfolio Servicing, Inc. (SPS), 690 F. App'x 649, 650 (11th Cir. 2017) (citations and quotations omitted).

## DISCUSSION

### I. Count 1: Contempt Claim

On December 14, 2016, the City issued a Notice of Administrative Hearing (hereafter, "Hearing Notice"), informing Mr. Kessler that a City Special Magistrate would be conducting an administrative hearing on January 25, 2017 regarding a code violation at the Garrison Bight Slip, which was the subject of an earlier issued Notice of Code Violation. See Compl. Ex.1 [D.E. 1 at 41-43]; Am. Compl. [D.E. 26 ¶ 16]. The required corrective action for the code violation was to "repair and secure the floating devices of [Plaintiffs' liveaboard vessel]." See Compl. Ex.1 [D.E. 1 at 42]. On January 25, 2017, Plaintiffs removed the Hearing Notice to this Court, under Case No. 17-cv-10013-JLK (hereafter, "Removal Case"). See Compl. Ex. 1 [D.E. 1 at 40]; Am. Compl. [D.E. 26 ¶¶ 22-23]. The Removal Case was dismissed with prejudice on June 30, 2017 for lack of subject matter jurisdiction (hereafter, "Order of Dismissal"). See Compl. Ex. 2 [D.E. 1 at 49-51]; Am. Compl. [D.E. 26 ¶¶ 22-24]. Plaintiffs allege that, following entry of the Order of Dismissal, the City filed a Complaint for Eviction (hereafter, "Eviction Complaint") against Plaintiffs in state

court, "alleging as a basis the Code Enforcement matter that had just been dismissed." See Am. Compl. [D.E. 26 at 3; ¶¶ 30, 61, 107].

Plaintiffs contend that the City Defendants "have acted in blatant disregard of this Court's Rules and Orders, in derogation of the authority of this Honorable Court, and the Rule of Law" by: (1) forcing Plaintiffs to "defend three Code Enforcement hearings after the matter was removed to Federal Court"; and (2) filing the Eviction Complaint against Plaintiffs based on the code enforcement violation that had been dismissed in the Removal Case. See Am. Compl. [D.E. 26 ¶¶ 58-63].

While federal courts have the power to enjoin state courts from proceeding in a case that has been removed, there is no standalone federal cause of action for a state court's failure to stay proceedings. See Maseda v. Honda Motor Co., 861 F.2d 1248, 1255 (11th Cir. 1988) (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966)).

Additionally, "there is no such thing as an independent cause of action for civil contempt; civil contempt is a device used to coerce compliance with an *in personam* order of the court which has been entered in a pending case." Blalock v. United States, 844 F.2d 1546, 1550 (11th Cir. 1988) (citing McComb v. Jacksonville Paper Co., 336 U.S. 187, 189 (1949)).

In light of the foregoing, the undersigned finds that Count 1 of the Amended Complaint fails to state a cause of action and is subject to dismissal.

## II. Counts 4-6: Due Process Claims[2]

In addition to the allegations described in the previous section, Plaintiffs allege that, following the dismissal of the Removal Case, the City Defendants decided to terminate the Lease Agreement for the Garrison Bight Slip. See Am. Compl. [D.E. 26 ¶ 34]. The Lease Agreement states: "In the event [the City] otherwise determines not to renew the tenancy, it shall provide [Plaintiffs] both thirty (30) days' notice and the option of a hearing before the Port Advisory Board." See Lease Agreement [D.E. 23-1 at 2-3].[3] However, the City advised Plaintiffs that any hearing they requested would be conducted by the City Manager because the Port Advisory Board had previously been disbanded. See Am. Compl. [D.E. 26 at 5-6; ¶¶ 34-35, 89-91]. Plaintiffs allege that they attended the hearing regarding the termination of the Lease Agreement under protest. Id. ¶ 37. Ultimately, the City Manager "upheld the lease termination." Id. ¶ 92. Plaintiffs allege that in September 2018, the City and/or Individual City Defendants shut down Plaintiffs' utility accounts for the Garrison Bight Slip, "moved another floating home in the marina into [the Garrison Bight Slip], and removed [Plaintiffs'] remaining personal property from [the Garrison Bight Slip] . . . ." Id. ¶ 42, 81.

Based on these allegations, Plaintiffs assert that: (1) their procedural due process rights were violated; (2) the City Defendants violated the Takings Clause; and (3) their substantive due process rights were violated. Id. at 27-36.

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[2] The heading of Count 5 makes reference to Title 42, United States Code, Section 1985 (hereafter, "Section 1985"). However, in Count 5, Plaintiffs failed to plead any facts alleging a conspiracy by the Individual City Defendants to interfere with Plaintiffs' civil rights. See 42 U.S.C. § 1985. In light of the foregoing, any purported cause of action under Section 1985 in Count 5 is subject to dismissal. See Baker v. City of Hollywood, No. 08-CV-60294, 2008 WL 2474665, at *7 (S.D. Fla. June 17, 2008), aff'd, 391 F. App'x 819 (11th Cir. 2010).

[3] Because the Lease Agreement was incorporated by reference into the Amended Complaint, see Am. Compl. [D.E. 26 ¶¶ 83, 89, 94], the undersigned may consider same in addressing the Motion to Dismiss. See Done, 2010 WL 3824142, at *2.

A. Procedural Due Process

Plaintiffs allege that the City Defendants violated Plaintiffs' procedural due process rights in: their pursuit of the code enforcement violation; the filing of the Eviction Complaint; the termination of the Lease Agreement; the removal of Plaintiffs' personal property which remained at the Garrison Bight Slip; the cancellation of Plaintiffs' electric and water utilities at the Garrison Bight Slip; and the movement of another liveaboard vessel into the Garrison Bight Slip. See generally Am. Compl. [D.E. 26 ¶¶ 79-118].

"Again and again, this Court has repeated the basic rule that a procedural due process claim can exist only if no adequate state remedies are available." Flagship Lake Cty. Dev. No. 5, LLC v. City of Mascotte, Fla., 559 F. App'x 811, 815 (11th Cir. 2014) (citing Reams v. Irvin, 561 F.3d 1258, 1266–67 (11th Cir.2009)). "This rule . . . recognizes the state must have the opportunity to 'remedy the procedural failings of its subdivisions and agencies in the appropriate fora—agencies, review boards, and state courts' before being subjected to a claim alleging a procedural due process violation." Cotton v. Jackson, 216 F.3d 1328, 1331 (11th Cir. 2000) (quoting McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994)). "If the plaintiff had adequate state remedies at his disposal and failed to take advantage of them, he cannot claim that the state deprived him of procedural due process." Rudge v. City of Stuart, No. 11-CV-14306, 2012 WL 12950485, at *1 (S.D. Fla. Feb. 7, 2012), aff'd, 489 F. App'x 387 (11th Cir. 2012) (citing Cotton, 216 F.3d at 1330-31).

Plaintiffs' procedural due process claim fails because they failed to allege: (1) that adequate state remedies were unavailable to cure any alleged deprivations of procedural due process; or (2) that any available state remedies were inadequate. See Lacy v. City of St. Petersburg, Fla., 608 F. App'x 911, 912 (11th Cir. 2015); Flagship Lake Cty. Dev. No. 5, LLC, 559 F. App'x at 815;

Goodman v. City of Cape Coral, 581 F. App'x 736, 740 (11th Cir. 2014) ("Since the Florida courts possess the power to remedy any [procedural error], [the plaintiff] cannot claim that he was deprived of procedural due process.") (alterations in original) (quoting McKinney, 20 F.3d at 1565).

B. Takings Clause

Plaintiffs assert that the City violated the Takings Clause by terminating the Lease Agreement without adhering to the process set forth in Chapter 83 of the Florida Statutes, which governs residential tenancies. See Am. Compl. [D.E. 26 ¶ 98].

The Takings Clause "prohibits governments from seizing private property for public use without providing the property owner just compensation." Oden, LLC v. City of Rome, Georgia, 707 F. App'x 584, 588 (11th Cir. 2017). It "requires payment of just compensation, without qualification, where a regulation 'compel[s] the property owner to suffer a physical invasion of his property,' or 'denies all economically beneficial or productive use of land." Oden, LLC v. City of Rome, Georgia, 707 F. App'x 584, 588 (11th Cir. 2017) (alteration in original) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)). Like a violation of procedural due process, a claim under the Takings Clause is not actionable in federal court "unless the state provides no remedy to compensate the landowner for the taking." Bickerstaff Clay Prod. Co. v. Harris Cty., Ga. By & Through Bd. of Comm'rs, 89 F.3d 1481, 1490–91 (11th Cir. 1996). "[A] Florida property owner must pursue a reverse condemnation remedy in state court before his federal takings claim will be ripe . . . ." Reahard v. Lee Cty., 30 F.3d 1412, 1417 (11th Cir. 1994) (citing Exec. 100, Inc. v. Martin Cty., 922 F.2d 1536, 1542 (11th Cir. 1991)).

Because Plaintiffs have failed to allege that there is no remedy at the state level, or that they have exhausted all remedies at the state level, Plaintiffs fail to state a cause of action under the Takings Clause. See Bickerstaff Clay Prod. Co., 89 F.3d at 1481.

C. Substantive Due Process

Plaintiffs allege that: (1) they "enjoyed a constitutionally-protected property interest in their continued residency at Garrison Bight Marina, and they were deprived of that interest"; and (2) they had "substantive . . . due process rights in the uninterrupted enjoyment of its comforts and security." See Am. Compl. [D.E. ¶¶ 84, 86].

"[T]he substantive component of the Due Process Clause protects those rights that are fundamental, that is, rights that are implicit in the concept of ordered liberty." Kentner v. City of Sanibel, 750 F.3d 1274, 1279 (11th Cir. 2014) (quoting McKinney, 20 F.3d at 1556). "Fundamental rights are those rights created by the Constitution." Kentner, 750 F.3d at 1279 (citing DeKalb Stone, Inc. v. County of DeKalb, Ga., 106 F.3d 956, 959 n.6 (11th Cir.1997)). Because state-created property interests are not created by the Constitution, "there is generally no substantive due process protection for state-created property rights." Kentner, 750 F.3d at 1279 (citing Vinyard v. Wilson, 311 F.3d 1340, 1356 (11th Cir. 2002); see also Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .").

However, there is an exception to the "general rule that there are no substantive due process claims for non-fundamental rights." Kentner, 750 F.3d at 1279. The exception is applicable when an individual's state-created rights are infringed by a legislative act. Kentner, 750 F.3d at 1279-80. Generally, legislative acts apply to a large segment, if not all, of society. Id. at 1280 (citing McKinney, 20 F.3d at 1557 n.9). Examples of legislative acts include laws and regulations. Kentner, 750 F.3d at 1280 (quoting McKinney, 20 F.3d at 1557 n.9). Alternatively, executive acts, for which substantive due process rights are not afforded, "arise from the ministerial or

administrative activities of the executive branch and characteristically apply to a limited number of people, often only to one." Kentner, 750 F.3d at 1280 (quoting McKinney, 20 F.3d at 1557 n.9).

Because Plaintiffs' alleged property interests were created by state law, substantive due process is only applicable if the City Defendants' actions were legislative rather than executive. See Kentner, 750 F.3d at 1279; Roth, 408 U.S. at 577. As pled, Plaintiffs contest the City Defendants' application and administration of rules and regulations with respect to the termination of the Lease Agreement and the events that transpired thereafter. Because the application and administration of rules and regulations are executive actions, the legislative act exception is not applicable. Hence, Plaintiffs substantive due process claim fails. See Hillcrest Prop., LLP v. Pasco Cty., 915 F.3d 1292, 1301-03 (11th Cir. 2019); Eisenberg v. City of Miami Beach, 54 F. Supp. 3d 1312, 1324-27 (S.D. Fla. 2014).

### III. Count 7: Equal Protection Claim[4]

As the basis for their equal protection claim against the City Defendants, Plaintiffs assert that the City Defendants treated Plaintiffs differently than other members of the liveaboard community who also used supplemental floatation devices but were not subjected to a code enforcement violation, an eviction action, and a lease termination. See Am. Compl. [D.E. 26 ¶¶ 119-126].

To state a cause of action under a class of one theory, Plaintiffs must allege facts to sufficiently demonstrate "that they were treated differently from other similarly situated individuals absent a rational basis for the differential treatment." VTS Transportation, Inc. v. Palm

[4] The heading of Count 7 also makes reference to Section 1985. However, in Count 7, Plaintiffs failed to plead any facts alleging a conspiracy by the City Defendants to interfere with Plaintiffs' civil rights. See 42 U.S.C. § 1985. In light of the foregoing, any cause of action under Section 1985 in Count 7 is also subject to dismissal. See Baker, 2008 WL 2474665, at *7.

Beach Cty., 239 F. Supp. 3d 1350, 1354 (S.D. Fla. 2017) (citing Grider v. City of Auburn, Ala., 618 F.3d 1240, 1263–64 (11th Cir. 2010). "[W]ith respect to a class-of-one claim, 'we are obliged to apply the "similarly situated" requirement with rigor." Douglas Asphalt Co. v. Qore, Inc., 541 F.3d 1269, 1275 (11th Cir. 2008) (quoting Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1207 (11th Cir. 2007)) (To satisfy the similarly situated element, the purported comparators "must be *prima facie* identical in all relevant respects.").

Plaintiffs attempt to satisfy the similarly situated element by referencing "6 comparators" that were described in correspondence dated July 22, 2016. See Compl. Ex. 6 [D.E. 1 at 75]; Am. Compl. [D.E. 26 ¶ 124]. However, that correspondence, which discusses six liveaboard vessels, including Plaintiffs' liveaboard vessel which was docked in Slip 16 Sailfish Pier, states in pertinent part:

> Douglas N. Higgins, Inc. with the assistance of Key West Harbor Service conducted an underwater survey of all of the vessels on Sailfish Pier yesterday to make sure they were seaworthy before we start to relocate them to Kingfish Dock. There were six vessels (Slip #6, #7, #10, #14, #15 & #16) that were found to have unsecure floatation items under the vessels that need to be removed or secured with the approval of the contractor before the vessels can be safely moved. The unsecure floatation items range from plastic barrel[s] of many different sizes standing upright or laying on [their] side, tote boxes filled with air, Styrofoam [of] different sizes and shapes, HDPE tubes and boxes of many different sizes. The concern with these unsecured items is that there's a very good possibility that they will come out from under the vessel once we start to move causing the vessel to shift or become unstable that [causes] the vessel to strike other vessels, docks and piles, damage property inside the vessel; or cause the vessel to capsize or sink.
>
> There are structural integrity concerns along with the placement of the floatation items under the vessels in slip #15 & # 16. This could prohibit the floatation items from staying secure and this would cause the vessel to be unseaworthy.

See Compl. Ex. 6 [D.E. 1 at 75]. However, as described in the correspondence, the floatation devices used by the six liveaboard vessels were varied in size, shape, and materials. Moreover, structural integrity concerns only relate to one other liveaboard vessel besides Plaintiffs', namely,

the one docked at Slip 15. Additionally, correspondence from the City to Mr. Kessler dated September 28, 2016 distinguishes Plaintiffs' liveaboard vessel from the liveaboard vessel docked at Slip 15 by explaining that Plaintiffs' liveaboard vessel also suffers from the following defect: "floor joists that are completely exposed to salt water below without any barrier or shoring for said joists, which support the floor of the home." See Compl. Ex. 1 [D.E. 1 at 45]. As a result, Plaintiffs have failed to demonstrate that any of the purported comparators and Plaintiffs' liveaboard vessel were "*prima facie* identical in all relevant respects." See Irvin, 496 F.3d at 1207. Therefore, the undersigned concludes that Plaintiffs fail to state a cause of action under the class of one theory.

In any event, Plaintiffs failed to plead sufficient facts to demonstrate that there was no rational basis for any difference in treatment. See Am. Compl. [D.E. 26 ¶¶ 119-26]; See, e.g., Irvin, 496 F.3d 1207-08.

**IV. Count 8: State Law Claims**

Plaintiffs allege that the City Defendants' negligence set in motion a sequence of events that resulted in Plaintiffs' liveaboard vessel sinking after being struck with debris left in the wake of Hurricane Irma. See Am. Compl. [D.E. 26 ¶¶ 127-135]. As a result, Plaintiffs have asserted state law claims predicated on negligence against the City Defendants. Id.

Pursuant to Florida Statute § 768.28(6)(a), a condition precedent to instituting a claim against the state or one of its agencies or subdivisions is that the claimant must present the claim in writing to the appropriate agency. See Fla. Stat. § 768.28(6)(a). Because Plaintiffs failed to allege satisfaction of this condition precedent, Plaintiffs' state law claims are subject to dismissal. See Fluid Dynamics Holdings, LLC v. City of Jacksonville, 752 F. App'x 924, 926 (11th Cir. 2018) ("Failure to provide the required notice is 'fatal' to a tort suit against an entity with sovereign immunity.") (citing Menendez v. N. Broward Hosp. Dist., 537 So. 2d 89, 91 (Fla. 1988)).

Additionally, as it relates to the Individual City Defendants, Florida Statute § 768.28(9)(a) states, in pertinent part, that:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Fla. Stat. § 768.28(9)(a). Because Plaintiffs allege that the Individual City Defendants acted negligently, rather than wanton and willfully, they are immune from Plaintiffs' state law claims.

## RECOMMENDATION

Based on the foregoing considerations, the undersigned **RESPECTFULLY RECOMMENDS** that the Motion to Dismiss [D.E. 27] be **GRANTED** as follows: (1) Count 1 be dismissed with prejudice because the defects described above cannot be cured and further amendment would be futile, see Jones v. CitiMortgage, Inc., 666 F. App'x 766, 777 (11th Cir. 2016); and (2) Plaintiffs be afforded one final opportunity to amend their pleading as to the remaining Counts.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have **fourteen days** from the date of this Report and Recommendation to file written objections, if any, with the Honorable Jose E. Martinez. Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. See Resolution Tr. Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." See 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 20th day of December, 2019.

ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Jose E. Martinez
Pamela and Stuart Kessler, *pro se*
Counsel of Record