UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARNOLD HERSKO, Individually and as Administrator of the Estates of Rochel Hersko and Arnold Hersko,

Plaintiff,

-v.-

UNITED STATES OF AMERICA, *et al.*,

Defendants.

MEMORANDUM ORDER

13-CV-3255 (JLC)

JAMES L. COTT, United States Magistrate Judge.

In this medical malpractice case, defendants have moved *in limine* to preclude the testimony of four experts retained by plaintiff. These experts include a neurologist, a psychologist, an economist, and a school principal who purports to be an expert on the role of the Ultra-Orthodox mother. Each expert plans to testify to damages, not liability. For the reasons that follow, the Court grants defendants' motions *in limine* in full, except that the psychologist and economist may testify about the loss of household services that plaintiff experienced as a result of his wife's death.[1]

[1] The Court resolved these motions at a conference on October 13, 2016, and advised the parties at that time that this written decision would follow.

I. BACKGROUND

A. Underlying Facts

The Court assumes familiarity with the tragic facts underlying this case and will not repeat them here in detail.[2] In short, Rochel Hersko, the wife of plaintiff Arnold Hersko, died on October 11, 2007, during or shortly after the birth of the couple's daughter, Esther Hersko. *See* Summary Judgment Order at 14. When Mrs. Hersko passed away, she left behind the plaintiff and their four children: Esther, who survived the birth; Yosef, who was 10 years old at the time; Malka, who was seven; and Rivka, who was three.[3] Rozman Report at 1; Summary Judgment Order at 4–5; Dr. Schuster's Report, dated Mar. 17, 2016, Dkt. No. 133-2 ("Revised Schuster Report"), at 2–3.

Plaintiff attributes Mrs. Hersko's death to the medical malpractice of doctors associated with New Square Ob/Gyn Associates and Refuah Health Center—facilities that, collectively, provided Mrs. Hersko with primary, gynecological, and obstetrical care. Summary Judgment Order at 3. Because Refuah Health Center is a recipient of federal funds, the United States is sued under the Federal Tort Claims Act. *Id.* at 18.

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[2] For a fuller recitation of the facts, the parties are directed to Judge Dolinger's Memorandum and Order that decided defendants' motions for summary judgment. *See* Memorandum & Order, dated Oct. 20, 2015, Dkt. No. 111 ("Summary Judgment Order").

[3] Although defendants have redacted the children's names in their submissions, plaintiff has not done so. *See, e.g.*, Amended Complaint, dated Oct. 14, 2010, Dkt. No. 13, ¶ 7; Rozman Report, dated Oct. 22, 2014, Dkt. No. 148-2 ("Rozman Report"), at 1. At the October 13 conference, plaintiff's counsel indicated that they had no objection to the use of the children's names in this decision.

B. Judge Dolinger's Decision on Defendants' Motion to Strike

After fact discovery was complete and while expert discovery was underway, defendants moved to strike the expert reports of Drs. Daniel Adler and Richard Schuster and to preclude their testimony at trial. Memorandum & Order, dated Oct. 22, 2014, Dkt. No. 72 ("Mot. To Strike Order"), at 2; Dkt. Nos. 60–62. Defendants also moved to partially strike the expert report of Dr. Conrad Berenson and to partially preclude his testimony. Mot. To Strike Order at 2–3. In a Memorandum and Order dated October 23, 2014, Magistrate Judge Dolinger, who was previously assigned to this case, granted defendants' motion to strike in part. *Id.* at 17.[4]

In that decision, Judge Dolinger made several determinations that are relevant to the motions *in limine* now before the Court. Indeed, both parties rely on Judge Dolinger's decision in their motion papers, and neither party asks the Court to reconsider Judge Dolinger's rulings or disputes that those rulings constitute the law of the case. *See In re Peters*, 642 F.3d 381, 386 (2d Cir. 2011) ("The law of the case doctrine, although not binding, counsels a court against revisiting its prior rulings in subsequent stages of the same case absent cogent and compelling reasons, including, *inter alia*, the need to correct a clear error or prevent manifest injustice."); *City of New York v. Gordon*, 155 F. Supp. 3d 411, 419 (S.D.N.Y. 2015)

[4] In July 2013, the parties consented to the jurisdiction of a magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure. Dkt. No. 40. On October 20, 2015, the case was reassigned from Judge Dolinger upon his retirement to the undersigned.

("The doctrine continues to apply even where a case has been reassigned to a new judge.").

Plaintiff goes so far as to argue that defendants' motions *in limine* "were previously disposed of by Judge Dolinger" and that the present motions are therefore "nothing more than an attempt to obtain a 'second' bite at the apple." Plaintiff's Memorandum of Law in Opposition to Motions In Limine, dated June 1, 2016, Dkt. No. 147 ("Pl. Opp."), at 1. Although Judge Dolinger granted defendants' motion to strike only in part after concluding that some of plaintiff's proposed expert testimony was "potential[ly] admissibl[e]," Judge Dolinger expressly noted that his decision was "without prejudice to reassessment at the conclusion of expert discovery." Mot. To Strike Order at 17. Indeed, at the time of his decision, none of the experts had been deposed, and plaintiff had not yet fulfilled his obligations under Federal Rule of Civil Procedure 26(a)(2)(B) with respect to Eva Rozman. *Id.* at 4. Moreover, in response to Judge Dolinger's rulings, at least two of plaintiff's experts, namely, Drs. Richard Schuster and Conrad Berenson, revised their expert reports, and these reports have never been subject to judicial review. In short, Judge Dolinger's decision, though highly relevant to many of the issues now before the Court, does not preclude defendants' motions *in limine*.

C. Overview of Defendants' Motions *In Limine*

Plaintiff has retained four experts to testify about damages issues: pediatric neurologist Dr. Daniel Adler; psychologist Dr. Richard Schuster; economist Dr. Conrad Berenson; and school principal Eva Rozman. *See id.* at 2, 3. Rozman does

not hold advanced degrees in any subject, but plaintiff has described her as an expert on "the unique cultural and religious services provided by a Hasidic Jewish mother and wife." Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Strike, dated Oct. 3, 2014, Dkt. No. 69, at 3.

Joining in each other's motions, the United States and the private defendants have collectively moved *in limine* to preclude the testimony of all four of these experts. *See* United States of America's Motion *In Limine* to Preclude Expert Testimony of Conrad Berenson and Eva Rozman, dated May 11, 2016, Dkt. No. 143 ("Gov't Mem.") at 1 n.1; Memorandum of Law in Support of New Square Defendants' Motion *In Limine*, dated May 11, 2016, Dkt. No. 134 ("New Square Mem."), at 1 n.1 (moving to preclude testimony of Drs. Schuster and Adler).

II. DISCUSSION

A. Standard for Expert Testimony Under Rule 702

Rule 702 of the Federal Rules of Evidence provides that qualified experts may testify if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." The current version of Rule 702 incorporates the standards established in the seminal Supreme Court cases *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v.*

Carmichael, 526 U.S. 137 (1999). *See In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 593 F. Supp. 2d 549, 555–56 (S.D.N.Y. 2008).

In *Daubert*, the Supreme Court required trial courts to serve as gatekeepers of expert testimony to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. In *Kumho Tire*, the Supreme Court held that *Daubert*'s gatekeeping obligation applies to non-scientific experts as well. 526 U.S. at 141.

"In determining the admissibility of expert testimony, it is the proponent's burden under *Daubert* to establish admissibility, rather than the opponent's burden to establish inadmissibility." *United States v. Morgan*, 53 F. Supp. 3d 732, 740 (S.D.N.Y. 2014) (internal citations, alterations, and quotation marks omitted); *Daubert*, 509 U.S. at 593 n.10. That said, the standard for admissibility is generally lenient in the Second Circuit, and the rejection of expert testimony is the "'exception rather than the rule.'" *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 115 (S.D.N.Y. 2015) (quoting Fed. R. Evid. 702 Advisory Comm. Note (2000)).

B. Limited Scope of Damages

All four experts plan to testify regarding plaintiff's damages. *See* Joint Pre-Trial Order, dated May 11, 2016, Dkt. No. 136 ("JPT Order"), at 14–15 (listing the four experts as "damages" witnesses).[5] For this reason, it is important to

[5] In their joint pretrial order, the parties initially proposed a bifurcated trial, with a separate damages phase. JPT Order at 12. More than three months later, in pretrial motion papers regarding other issues, plaintiff purported to "withdraw" his consent to a bifurcated trial. Dkt. No. 166 at 1. At the October 13 conference, in part due to the Court's rulings herein, the parties and the Court agreed that the trial would not be bifurcated.

understand two restrictions on damages in this case. First, under New York Estates, Powers and Trusts Law ("EPTL") § 5-4.3, which the parties agree applies here, the estate's damages are limited to "pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought." EPTL § 5-4.3(a); Mot. To Strike Order at 4 (noting that the "parties do not dispute that the claims asserted by the estate are governed by" EPTL § 5-4.3). As the New York Court of Appeals has explained, New York has "steadfastly restricted recovery to 'pecuniary injuries,' or injuries measurable by money, and denied recovery for grief, loss of society, affection, conjugal fellowship and consortium." *Gonzalez v. New York City Hous. Auth.*, 77 N.Y.2d 663, 667–68 (1991) (citation omitted). "Thus, the essence of the cause of action for wrongful death . . . is that the plaintiff's reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death." *Id.* at 668 (citation omitted). Although the Hersko children, as distributees of their mother's estate, may recover for the loss of parental care, guidance, and nurturing, damages for "'sorrow or mental anguish'" are unavailable to them. Mot. To Strike Order at 5 (quoting *In Re Acquafredda*, 189 A.D.2d 504, 516 (2d Dep't 1993)).

Second, plaintiff brought this case in an individual capacity and as the administrator of his wife's estate. None of the Hersko children is named as a plaintiff and, consequently, "the lawsuit cannot trigger recovery for physical or psychological injuries to Esther Hersko, or emotional distress caused to her siblings, as a result of their mother's death, or for the expenses of treatment of those injuries

or conditions." Mot. To Strike Order at 3. Again, plaintiff may recover for the Hersko children's loss of their mother's services under EPTL § 5-4.3, but their psychological injuries and, in the case of Esther, physical injuries are irrelevant. These limitations narrow the scope of permissible expert testimony considerably, as is discussed further below.

C. Dr. Adler's Proposed Testimony

1. Judge Dolinger's Rulings on Dr. Adler's Report

Dr. Adler, who is a pediatric neurologist, completed a three-page expert report, which addresses the neurological and developmental impairments of Esther Hersko. *See* Dr. Adler's Report, dated Feb. 24, 2014, Dkt. No. 133-4 ("Adler Report"). According to the report, Esther's condition "has required school based services including early intervention, speech, occupational and physical therapies"—services that Dr. Adler deems "medically necessary and appropriate." *Id.* at 1, 2. Dr. Adler asserts that Esther's "neurological injuries and disabilities will limit her employment opportunities in the competitive job market." *Id.* His report further opines that Esther's "neurological and neurodevelopmental disability" were caused by the circumstances of her birth. *Id.* at 2.

Judge Dolinger concluded that many of the opinions expressed in Dr. Adler's report were inadmissible and that others were potentially admissible but only for limited purposes and only if certain conditions were met. Mot. To Strike Order at 6–12. Specifically, Judge Dolinger concluded that "Dr. Adler's assessment of Esther's future capacity to find employment is plainly beyond the scope of relevance

for this case, as is his opining about the linkage between her condition and any negligence of the defendants." *Id.* at 6–7. Because Esther was not a named plaintiff, Judge Dolinger determined that "any injury that she may have sustained at birth, as well as the long-term consequences to her of those injuries, as an alleged result of medical malpractice are not subject to recovery." *Id.* at 6.[6]

In fact, Judge Dolinger concluded that the "only potentially relevant purpose" of Dr. Adler's report was to show that Esther's condition would "compel a parent (or substitute) to provide services beyond those normally required for a healthy child"—the idea being that, had Mrs. Hersko lived, she would have worked extra hard tending to Esther's needs and that the estate could recover for the loss of these extra services under EPTL § 5-4.3. *See id.* at 7. But, according to Judge Dolinger's order, the relevance of Dr. Adler's opinions for this purpose hinged on the presence of other evidence not included in the report—namely, evidence that Esther's maternal substitutes were actually burdened by her conditions "in arranging for [her] treatment or dealing with those conditions in the household." *Id.* at 8. Without such evidence, Judge Dolinger concluded that Dr. Adler's opinions would be inadmissible, as Esther's birth-related injuries are, by themselves, irrelevant given that Esther is not a named plaintiff with malpractice claims against defendants.

[6] Unlike Drs. Schuster and Berenson, Dr. Adler did not revise his report, despite Judge Dolinger's ruling that certain opinions expressed therein were categorically inadmissible.

2. Dr. Adler's Deposition

Although Judge Dolinger concluded that the opinions expressed in Dr. Adler's report were "at least potentially relevant" to the extent that they described conditions that burdened Esther's caretakers, Judge Dolinger noted that Dr. Adler had not yet been deposed and that his deposition might create "fresh grounds on which to preclude" his testimony. *Id.* at 12. At his deposition, Dr. Adler testified that Esther required school-based services as a result of her neurological condition. Transcript of Dr. Adler's Deposition, dated Mar. 17, 2015 ("Dr. Adler Dep. Tr."), at 48:2–10, 91:3–19.[7] Counseling was the only potentially necessary non-school-based service, as Dr. Adler was unsure whether Esther's school offered adequate counseling. Dr. Adler Dep. Tr. at 109:3–110:23. Dr. Adler admitted, however, that he was unaware whether Esther was receiving psychological counseling or other services at all, whether at school or elsewhere. *Id.* at 93:3–95:5. Additionally, although Dr. Adler's report noted that Esther had showed signs of "[b]ehavioral variability," Dr. Adler testified at his deposition that this observation related to difficulties at school, not at home. *Id.* at 87:4–88:19; Adler Report at 2.

3. Preclusion of Dr. Adler's Testimony

The Court concludes that Dr. Adler is precluded from testifying. Judge Dolinger ruled that Dr. Adler's testimony was conditionally relevant, but plaintiff

[7] Defendants included excerpts of Dr. Adler's deposition transcript in their motion papers. Dkt. No. 133-5. At the Court's request, however, defendants later submitted the entire transcript of Dr. Adler's deposition, along with the deposition transcripts of the other three experts. Dkt. No. 152. The experts' complete deposition transcripts are not on the docket.

has pointed to no evidence indicating that the required conditions have been fulfilled. For Dr. Adler's testimony to be relevant, plaintiff needed evidence of "actual burdens borne by parental substitutes" as a result of the neurological conditions that Dr. Adler described. Mot. To Strike Order at 8. Defendants assert that discovery has revealed no such evidence of burdens in the home. New Square Mem. at 11. And plaintiff, who has the burden of establishing the relevance of his expert's proposed testimony, points to no such evidence.

Further, there is no evidence before the Court that Esther's caretakers have been burdened in arranging for the treatment of Esther's neurological conditions. Dr. Adler testified that Esther required school-based services, which would not appear to create substantial hardships for Esther's maternal substitutes. Adler Dep. at 48:2–10, 91:3–19. But Dr. Adler was unaware as to whether Esther was receiving any services, school-based or not, at the time of his deposition. *Id.* at 93:3–95:5. Indeed, Dr. Schuster's deposition testimony implies that Esther's grandmother, who was serving as her primary custodian, chose not to pursue services for Esther given her (possibly misguided) belief that services were unnecessary. Transcript of Dr. Schuster's Deposition, dated Apr. 23, 2015 ("Schuster Dep. Tr."), at 71:16–72:2, 94:13–96:3. Because plaintiff has failed to direct the Court to evidence that Esther's maternal substitutes have been especially burdened in caring for Esther due to her neurological condition, Dr. Adler is precluded from testifying, as plaintiff has failed to carry his burden of establishing that Dr. Adler's testimony is relevant to damages available in this case.

D. Dr. Schuster

1. Judge Dolinger's Rulings on Dr. Schuster's Report

Dr. Schuster, who is a psychologist, originally submitted an expert report, dated May 20, 2014, which examined the psychological impact of Mrs. Hersko's death on plaintiff and each of the four Hersko children. Dr. Schuster's Original Report, dated May 20, 2014, Dkt. Nos. 61-3, 61-4, 61-5 ("Original Schuster Report"). For the children, the report listed behavioral difficulties that Dr. Schuster attributed to their mother's death and services that each child required as a result. *Id.*

Judge Dolinger ruled that many of the opinions expressed in Dr. Schuster's original report were inadmissible. Mot. To Strike Order at 14. In response, Dr. Schuster submitted a revised report. *See* Revised Schuster Report; Schuster Dep. Tr. at 29:5–30:5. As defendants argue, and as plaintiff appears to concede, Dr. Schuster's revisions have not gone far enough to overcome the deficiencies previously identified.

2. Dr. Schuster's Evaluation of Esther Hersko

Dr. Schuster's original report opined that Esther had medical, psychological, and behavioral problems that would require, among other things, visits to neurologists, cardiologists, psychiatrists, psychologists, and speech therapists. Original Schuster Report, Dkt. No. 61-4 at 19, 26–27.[8] Regarding this portion of Dr.

[8] Because the internal pagination of the report on cited pages is sometimes indecipherable, these citations refer to page numbers generated by the Court's ECF system.

Schuster's report, Judge Dolinger ruled that, "[f]or reasons noted with respect to Dr. Adler's report . . . , Dr. Schuster's assessment of her behavioral issues and medical needs are potentially pertinent." Mot. To Strike Order at 13. Under Judge Dolinger's ruling, defendants contend, and plaintiff does not dispute, that the relevance of Dr. Schuster's assessment of Esther hinges on the presence of evidence that Esther's caretakers have been burdened by her special needs. New Square Mem. at 11–12.

As noted above, plaintiff, who has the burden of establishing the relevance of his expert witness's testimony, has not directed the Court to any such evidence. Although Dr. Schuster recommends substantial medical and psychological treatment, there is no evidence that Esther has received such treatment—much less evidence that Esther's maternal substitutes have borne burdens in arranging for it.

The extent to which plaintiff and Dr. Schuster have ignored Judge Dolinger's rulings are remarkable. Although Dr. Schuster revised his report, his evaluation of Esther appears to be word-for-word identical to the original, indicating that Dr. Schuster made no serious effort to comply with Judge Dolinger's ruling in his evaluation of Esther. *Compare* Original Schuster Report, Dkt. No. 61-4 at 8–37 *with* Revised Schuster Report at 40–59.[9] For example, the revised report includes projected costs for Esther's medical and psychological treatment, which Judge Dolinger had ruled were irrelevant. *See* Mot. To Strike Order at 3; New Square Mem. at 13.

[9] Because the internal pagination is often difficult to follow, these citations refer to page numbers generated by the Court's ECF system.

3. Dr. Schuster's Evaluation of Yosef Hersko

Regarding Dr. Schuster's assessment of the three older Hersko children (Yosef, Malka, and Rivka), Judge Dolinger concluded that Dr. Schuster was precluded from testifying about the "emotional impact of their mother's death," the children's "consequential behavioral difficulties," or "services that will be required to treat" their conditions. Mot. To Strike Order at 14. Judge Dolinger so ruled because recovery for these injuries is unavailable under EPTL § 5-4.3. *Id.*

In accordance with Judge Dolinger's ruling, Dr. Schuster eliminated the evaluations of Malka and Rivka from his revised report. But the revised report still includes an evaluation of Yosef. Revised Schuster Report at 8–30. The theory for including Yosef appears to be that, unlike Malka and Rivka, Yosef had "premorbid" psychological issues that Mrs. Hersko would have tended to had she survived. Letter from Dr. Schuster to Plaintiff's Counsel, dated Mar. 17, 2015, Dkt. No. 133-2, at 1.

But Dr. Schuster's opinions appear to be inconsistent with this theory. Dr. Schuster has opined that, before his mother's death, Yosef "did not foster severe adjustment or functional limitations" and that, but for her death, he would lead a largely normal independent life.[10] These observations cannot be easily squared

[10] *See* Schuster Original Report at 26 ("There are indications in the records of an underlying ADHD, tics, potential learning problems etc. even prior to his mother's unfortunate demise. However, these problems did not foster severe adjustment or functional limitations in terms of Yosef's school and daily behaviors. It could be anticipated that if Yosef did not experience his subsequent deterioration, he would likely have been capable of basic competitive positions, and been able to live independently. In contrast, Yosef's behavior and adjustment significantly declined after his mother's death.").

with the notion that, had Mrs. Hersko lived, she would have been especially burdened by Yosef's needs. Indeed, Dr. Schuster's original and revised reports are replete with observations that Yosef was a largely stable child until his sudden deterioration following his mother's death.[11]

Moreover, although Dr. Schuster's evaluation includes a detailed chronology of Yosef's medical history, the chronology begins in March 2008—months after his mother's death. Revised Schuster Report at 9–15. There is no detailed discussion of Yosef's medical and psychological state before this time, except for a few passing references to the fact that he had certain underlying conditions but that they did not result in severe limitations or behavioral problems until his mother died. *See, e.g.*, Schuster Original Report at 26.

It is plain that Dr. Schuster's evaluation of Yosef was prepared with an eye toward recovering damages for the psychological impact of his mother's death—damages that are unavailable under EPTL § 5-4.3. Dr. Schuster's attempts to comply with Judge Dolinger's ruling on this point appear less than half-hearted. Indeed, Dr. Schuster's revised evaluation of Yosef is almost word-for-word identical to the original. *Compare* Original Schuster Report at 10–27, *with* Revised Schuster

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[11] *See, e.g.*, Revised Schuster Report at 17 ("When [his] mother was still alive, there was never any sort of complaint about him. . . . After his mother's tragic death, everything suddenly changed."), at 18 ("[T]he sudden tragic passing of Yosef's mother had a hugely damaging tremendously adverse effect on him. . . . All signs [of his behavioral and emotional problems] pointed to his mother's sudden death."); Schuster Original Report at 21 ("Although there are indications in the record of previous difficulties in Yosef's adjustment, before his mother passed away there were no severe problems as those noted post his mother's demise.").

Report at 8–25. Dr. Schuster has eliminated certain services for Yosef, but there does not appear to be a reason for the eliminations. Indeed, although Dr. Schuster previously opined that, but for his mother's death, Yosef would have been capable of obtaining "basic competitive positions" and living "independently," Dr. Schuster's revised report indicates that, from age 21 on, Yosef will require 40 to 50 hours of weekly "housekeeper" services and residence in a "group home." Revised Report at 49. At his deposition, Dr. Schuster implied that he may have misunderstood Judge Dolinger's decision and only included services for conditions that were caused or "exacerbated" by his mother's death—services that are not relevant under the dictates of Judge Dolinger's rulings. Schuster Dept. Tr. at 54:10–55:16, 58:16–19, 93:18–24; New Square Mem. at 4–5. In any event, the Court concludes that Dr. Schuster's testimony with respect to Yosef is inadmissible, as plaintiff has not shown that it is relevant or reliable.

Although it is not entirely clear, plaintiff appears to concede that Dr. Schuster's testimony about Yosef is inadmissible. Pl. Opp. at 2 ("Plaintiff concedes that Dr. Schuster's testimony is inadmissible on the issue of the family's anguish over the death of Rochel Hersko."). To the extent that plaintiff did not intend to concede this point, plaintiff has waived any opposition to it, as plaintiff's opposition papers are otherwise silent with respect to Dr. Schuster's evaluation of Yosef, despite defendants' detailed arguments in favor of preclusion. *See United States v. Roberts-Rahim*, No. 15-CR-243 (DLI), 2015 WL 6438674, at *9 (E.D.N.Y. Oct. 22, 2015) ("Defendant did not oppose this portion of the Government's motion *in limine*,

and, therefore, waived any objection to the preclusion of this evidence."). Whether by concession, waiver, or on the merits, Dr. Schuster is precluded from offering any opinion with respect to Yosef.

4. Dr. Schuster's Assessment of Plaintiff

In addition to Dr. Schuster's evaluations of the Hersko children, Dr. Schuster also discusses the psychological impact of Mrs. Hersko's death on plaintiff. Defendants' motion to strike did not address Dr. Schuster's analysis of plaintiff, but Judge Dolinger nonetheless questioned whether it "involve[d] expert testimony that would be helpful to the triers of fact" or whether it simply "recount[ed] what Mr. Hersko told Dr. Schuster." Mot. To Strike Order at 16 n.5; *see, e.g.*, *Brenord v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 133 F. Supp. 2d 179, 188 n.4 (E.D.N.Y. 2001) ("The ability of a district court to evaluate expert testimony *sua sponte* and exclude such testimony where appropriate has been recognized by several courts."). However, because defendants did not move to strike Dr. Schuster's report on this basis, the Court declined to address the issue. Mot. To Strike Order at 16 n.5.

Defendants now move *in limine* to preclude Dr. Schuster's assessment of plaintiff on this basis. New Square Mem. at 9–10. Dr. Schuster's discussion of plaintiff's emotional state reads as if he is simply recounting what plaintiff told him or what plaintiff said at his deposition. *See, e.g.*, Schuster Revised Report at 4 ("[Plaintiff] underwent a psychiatric evaluation, but opted not to continue treatment with the hope of trying to 'deal with it' independently. However, he acknowledges

that 'nothing is the same.' He is very lonely. He lacks 'the love of my life.' He has a 'heartache every waking moment.'"). It is unclear whether Dr. Schuster sought to offer an expert opinion on plaintiff's psychological state, or whether he included this information simply as background. Unlike as to the Hersko children, Dr. Schuster's report does not include a standalone "Evaluation" of plaintiff. Moreover, Dr. Schuster does not appear to offer any technical psychological diagnosis of plaintiff; instead, he simply notes, for example, that plaintiff is "'lonely'" and is experiencing "'heartache.'" *Id.*; New Square Mem. at 9–10.

As defendants argue, Dr. Schuster's assessment of plaintiff's state appears to "be directed to 'lay matters which a jury is capable of understanding and deciding without the expert's help.'" *See Snyder v. Wells Fargo Bank, N.A.*, 594 F. App'x 710, 714 (2d Cir. 2014) (citation omitted); New Square Mem. at 9–10. But the Court need not decide the issue, as plaintiff appears to have conceded the inadmissibility of this portion of Dr. Schuster's report. Pl. Opp. at 2 (conceding that "Dr. Schuster's testimony is inadmissible on the issue of the family's anguish over the death of Rochel Hersko"). To the extent that plaintiff did not intend to concede this point, he has waived any opposition, as his opposition papers are otherwise silent with respect to it. *See Roberts-Rahim*, 2015 WL 6438674, at *9.

In addition to assessing plaintiff's emotional state, Dr. Schuster asserts that plaintiff requires certain household services as a result of Mrs. Hersko's death. Defendants argue that such testimony would be duplicative, given that defendants' economic expert has agreed to adopt Dr. Schuster's calculations regarding

household services. New Square Mem. at 11 n.2. The Court will not preclude Dr. Schuster's testimony on this issue simply because defendants have consented to Dr. Schuster's calculations. If defendants are concerned about duplication, they can eliminate their own expert's testimony on this point. For these reasons, defendants' motion *in limine* with respect to Dr. Schuster is granted, except with respect to his testimony concerning household services necessitated by Mrs. Hersko's death.

E. Dr. Conrad Berenson

1. Judge Dolinger's Decision

Dr. Berenson, who is an economist, originally submitted a report that purported to "set forth the various economic losses arising from the death of" Mrs. Hersko. Dr. Berenson's Report, dated June 2014, Dkt. No. 61-6, at 2. Among other things, the report calculated the cost of psychological treatment, medical treatment, and other support services for each of Hersko child. *Id.* at 9–12. Dr. Berenson also calculated Yosef's lost lifetime earnings caused by his decline following his mother's death. *Id.* at 6–7. For plaintiff, the report quantified the lifetime costs of housekeeping and childcare services. *Id.* at 1, 3. Judge Dolinger concluded that Dr. Berenson's report required revision to account for his rulings with respect to Drs. Adler and Schuster, as Dr. Berenson's report appeared to quantify damages identified by them. Mot. To Strike Order at 16; *see Lava Trading, Inc. v. Hartford Fire Ins. Co.*, No. 03-CV-7037 (PKC), 2005 WL 4684238, at *3 (S.D.N.Y. Apr. 11, 2005) ("[B]ecause [plaintiff] concedes that the report of another of its damages

experts, Mr. O'Connor, is derivative of Dr. Clemons's report, . . . O'Connor's proposed expert testimony should also be precluded.").

In an attempt to comply with Judge Dolinger's order, Dr. Berenson completed a revised five-page report, dated March 5, 2015. Dr. Berenson's Revised Report, dated Mar. 5, 2015, Dkt. Nos. 144-1, 148-3 ("Revised Berenson Report"); Transcript of Dr. Berenson's Deposition, dated May 27, 2015 ("Berenson Dep. Tr."), at 8:14–9:7 (plaintiff's counsel stating that the revised report "is based upon the ruling by Judge Dolinger"). As plaintiff appears to concede, however, Dr. Berenson's revisions have not gone far enough to address the concerns identified in Judge Dolinger's decision.

2. Dr. Berenson's Calculations of Esther's Injuries

Dr. Berenson's revised report properly eliminated the damage calculations for the three older Hersko children. Inconsistent with Judge Dolinger's ruling, however, the revised report still calculates the costs of treatment for Esther, including the costs of seeing a neurologist, cardiologist, psychologist, occupational therapist, speech therapist, physical therapist, and gynecologist for the next 42 years. Revised Berenson Report at 2–3. Given that Esther is not a named plaintiff, Judge Dolinger made clear that these costs are irrelevant. Mot. To Strike Order at 3 ("[B]ecause the children are not named plaintiffs, the lawsuit cannot trigger recovery for physical or psychological injuries to Esther . . . or for the expenses of treatment of those injuries or conditions.").

In addition to being irrelevant, Dr. Berenson's calculations are unreliable, as Dr. Berenson testified at his deposition that he calculated the costs of various services by using figures provided to him by counsel—without independently analyzing whether the costs were reasonable. Berenson Dep. Tr. at 42:2–24, 64:5–9. For certain medical services, Dr. Berenson's estimated costs are often significantly higher than Dr. Schuster's estimates. For example, Dr. Schuster opined that a speech-therapist services would cost $250 per year, while Dr. Berenson (on instructions from plaintiff's counsel) assumed $2,500 per year. *Compare* Revised Schuster Report at 44, *with* Revised Berenson Report at 3. Similarly, Dr. Schuster opined that Esther's annual costs for neurological care would be $350 annually, whereas Dr. Berenson assumed a cost of $1,400. For these reasons, the Court concludes that Dr. Berenson's calculations of Esther's treatment are unreliable. *See, e.g.*, *E.E.O.C. v. Bloomberg L.P.*, No. 07-CV-8383 (LAP), 2010 WL 3466370, at *14 (S.D.N.Y. Aug. 31, 2010) ("Relying solely on the information fed to him by the EEOC without independently verifying whether the information is representative undermines the reliability of his analysis."); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98-CV-8272 (RPP), 2003 WL 22124991, at *3 (S.D.N.Y. Sept. 15, 2003) ("[A]ny expert should be aware that a party and counsel in a litigation have an interest in the outcome and that an expert study should not be dependent on the information they supply."); *see also Natividad v. Pronav Ship Mgmt., Inc.*, No. 99 CIV. 11852 (LLS), 2001 WL 357086, at *2 (S.D.N.Y. Apr. 9, 2001) ("The problem

appears to lie in Dr. Berenson's unthinking adoption of whatever was conveyed to him by plaintiff's attorneys.").

Dr. Berenson's report also calculates the cost of using a car service to transport Esther to various medical appointments and for a "Personal Care Aide" to accompany her on these appointments. Revised Berenson Report at 4; Berenson Dep. Tr. at 66:10–15. By assuming that Esther would require 209 medical visits per year at a cost of $206 per roundtrip, Dr. Berenson opines that Esther is entitled to $43,054 for annual transportation costs alone. Berenson Dep. Tr. at 85:4–9. But no medical professional has opined that Esther would require 209 medical visits per year and, indeed, Dr. Schuster's report anticipates far fewer appointments. *See* Revised Schuster Report at 44–45, 48. Rather than rely on figures provided by Dr. Schuster or any other medical professional, however, Dr. Berenson assumed 209 appointments because counsel told him to do so. Berenson Dep. Tr. at 72:18–73:2, 74:19–75:2. Consequently, the figure of 209 medical appointments is unreliable. *Id.* at 72:18–73:2, 74:19–75:2.

Because the calculated costs of hiring a personal aide to accompany Esther on her appointments derives from the number of appointments, Dr. Berenson's calculations with respect to the personal aide are also unreliable and inadmissible. Indeed, Esther's need for a personal aid appears to be a creation of plaintiff's counsel, as neither Drs. Adler nor Schuster suggested that Esther required these services. Nor is there any evidence before the Court that Esther has ever used the

services of a personal aide. Counsel simply asked Dr. Berenson to assume she would require an aide and he did so. *Id.* at 65:19–23

Regarding the cost of $206 per roundtrip, Dr. Berenson arrived at this number after receiving a quote from a single car service called Carmel Car and Limousine Service, which appears to be a New York City-based company that also services other areas.[12] Dr. Berenson testified that Carmel quoted the same price for a trip from Monsey, New York in Rockland County (where the Hersko family lives)—regardless of whether her destination was Mount Sinai in Manhattan or somewhere in Rockland or Westchester counties. Berenson Dep. Tr. at 85:14–86:13, 102:7–21. Dr. Berenson testified that he was unsure where Carmel dispatched its cars from, and he did not investigate the availability of Rockland- or Westchester-based car services. *Id.* at 86:19–87:6. The Court cannot conclude that $206 reliably represents the cost of using a car service for each medical appointment, especially not for appointments in Rockland or Westchester counties.

A more fundamental problem is that it is unclear whether car-service costs are relevant in the first place, and plaintiff has not attempted to explain their relevance. *See* Pl. Opp. at 3. There is no evidence that Esther travels to medical appointments (or anywhere else for that matter) by car service. Plaintiff testified at his deposition that Mrs. Hersko, who did not drive, traveled to her own appointments by bus. Deposition of Arnold Hersko, dated Aug. 9, 2012, at 215:20–216:9. When asked about the potential relevance of other modes of transportation

[12] *See* Carmel Car and Limousine Service, www.carmellimo.com (lasted visited Oct. 20, 2016).

used by Mrs. Hersko, Dr. Berenson responded that he was "asked to assume that [Mrs. Hersko] would have taken her daughter in a limo." *Id.* at 98:24–25. Any trace of critical thinking appears to be absent from Dr. Berenson's calculation of these alleged damages. For these reasons, Dr. Berenson is precluded from testifying about transportation costs. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002) ("[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony.").

Plaintiff, again, appears to concede that these calculations are inadmissible, as he has put forth no facts or argument as to why Dr. Berenson's calculations are relevant despite defendants' several arguments for why Dr. Berenson's testimony should be precluded. To the extent that plaintiff does not concede the inadmissibility of this testimony, he has waived his opportunity to respond. For all of these reasons, Dr. Berenson's testimony with respect to transportation costs is precluded.

3. Household Services for Plaintiff

The admissibility of Dr. Berenson's opinion regarding the value of Mrs. Hersko's household services is a closer call. Dr. Berenson attempts to value the household services that Mrs. Hersko would have provided to plaintiff had she survived, including "cooking, cleaning, laundering, sewing and the like." Revised

Berenson Report at 5.[13] Dr. Berenson's valuation of these services is based on a report called the Dollar Value of a Day: Time Diary Analysis, 2011 Dollar Valuation, which is based on an analysis of data from the U.S. Department of Labor's American Time Use Survey. *See* Revised Berenson Report at 5; Dollar Value of a Day report, Berenson Dep. Tr., Ex. E, Dkt. No. 144-6 ("Dollar Report"), at 7. This government survey randomly samples households in the United States to determine how people spend their time. Dollar Report at 7.

By relying on randomized survey data, Dr. Berenson's valuation of Mrs. Hersko's household services is not tailored especially well to the facts of this case. For example, there is no indication that Dr. Berenson accounted for the fact that Mrs. Hersko was "a traditional, extremely religious Orthodox Jew" who was focused on "maintaining a household which would be culturally consistent with her tradition," despite plaintiff's counsel informing him of as much. Berenson Dept. Tr. 102:7–103:3. Dr. Berenson appears to have taken into consideration the Hersko family members' respective ages and household size, and valued Mrs. Hersko's services as if she spent her time like the average woman sharing these characteristics. *Id.* at 103:4–9. Thus, as defendants point out, Dr. Berenson assumes that Mrs. Hersko spent some time tending to "pets, home & vehicles," even though there is no evidence to suggest that the Herskos owned a pet or a car. Gov't Mem. at 15. Defendants attest that, unlike Dr. Berenson, their expert economist

[13] The fifth page of the report is not actually numbered and is only included in the version of the report filed at Dkt. No. 144-1, not Dkt. No. 148-3. *See* Berenson Dep. Tr. at 7:18–8:2.

better tailors his calculations by relying on particularized data from Dr. Schuster. *Id.* at 16.

"[I]n accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in [an expert's] reasoning or methodology will warrant exclusion." *In re Fosamax Prod. Liab. Litig.*, 645 F. Supp. 2d 164, 173 (S.D.N.Y. 2009). "Minor flaws in an expert's analysis . . . can be probed through cross-examination and generally go to the weight to be accorded to the expert's testimony rather than admissibility." *R.F.M.A.S., Inc. v. So*, 748 F. Supp. 2d 244, 252 (S.D.N.Y. 2010). With respect to Dr. Berenson's calculation of lost household services, the Court concludes that the flaws in his report are not severe enough to warrant exclusion. On cross-examination, defendants may probe Dr. Berenson on the ways in which Mrs. Hersko may have differed from the average woman. *See Discover Fin. Servs. v. Visa U.S.A., Inc.*, 582 F. Supp. 2d 501, 507 (S.D.N.Y. 2008) ("To the extent Defendants have any questions about the weight or sufficiency of the evidence upon which [the expert] relied, or the conclusions generated therefrom, those questions can be asked on cross-examination."); *Okraynets v. Metro. Transp. Auth.*, 555 F. Supp. 2d 420, 449–50 (S.D.N.Y. 2008) (concluding that competing experts had both made reasonable assumptions where one looked at hours and wages of "average" worker and the other examined the particular individual's past performance); *DeLong v. Erie Cty.*, 89 A.D.2d 376, 386–87, (4th Dep't 1982), *aff'd sub nom. De Long v. Erie Cty.*, 60 N.Y.2d 296 (N.Y. 1983) (lower court properly admitted testimony of economist who "on the basis of statistical data . . . estimated

the time spent by an average housewife in the circumstances of decedent on various household tasks, including food preparation, house maintenance, clothing maintenance, family care, and other miscellaneous services, and then estimated the cost of purchasing such services in the employment market").

Although some experts may be better than others at tailoring their calculations of pecuniary damages to the facts of a particular case, courts have recognized that such valuations do not lend themselves to "mathematical precision" and that they "invoke[] elements necessarily uncertain in nature." *See, e.g.*, *Jones v. United States*, 304 F. Supp. 94, 97 (S.D.N.Y. 1969), *aff'd*, 421 F.2d 835 (2d Cir. 1970). Given the inherent uncertainty in valuing the lifetime services of Mrs. Hersko, the Court cannot conclude that relying on statistical averages is an unreasonable approach. *See Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 207 (2d Cir. 1984) (value of lost services is "inexact, since such proof by its nature usually cannot be precise"); *Moors v. Hall*, 143 A.D.2d 336, 339 (2d Dep't 1988) ("Contrary to the trial court's ruling, the fact that the plaintiff's expert, in evaluating the value of the plaintiff's domestic services, would necessarily depend upon official publications of statistics and other data which he had gathered, does not necessarily preclude the expert from testifying provided, *inter alia*, that the extraneous material 'is of a kind accepted in the profession as reliable in forming a professional opinion.' This requirement was satisfied in the case at bar.") (citation omitted).

Further, courts have admitted expert testimony based on the Dollar Value of a Day report in other cases. *See, e.g.*, *Ramirez v. Chip Masters, Inc.*, No. 11-CV-5772 (WFK) (MDG), 2014 WL 1248043, at *10 (E.D.N.Y. Mar. 25, 2014) (concluding that Dr. Berenson's valuation of "household service are well supported by empirical evidence and not contested" when he relied on "'the Dollar Value of a Day, Time Diary Analysis'"); *Ashford v. Wal-Mart Stores, LP*, No. 1:11-CV-57 (HSO) (JMR), 2013 WL 152853, at *5 (S.D. Miss. Jan. 15, 2013) (noting that the Dollar Value of a Day study "appears to be commonly relied upon by economists when calculating the economic value of lost household services" and rejecting defendant's motion *in limine* based on the expert's use of "estimates from tables contained in The Dollar Value of a Day, instead of basing his calculations on the specific amount of time that [plaintiff] engaged in particular household tasks" because this criticism went to "weight" not "admissibility").

Defendants argue that Dr. Berenson's testimony should be precluded based on two cases in which he testified. Gov't Mem. at 9, 10, 14 (citing *Silvestro v. City of New York*, No. 06-CV-646, slip. Op. at 5–10 (KAM) (VVP) (E.D.N.Y. Jan. 9, 2009); *Mono v. Peter Pan Bus Lines, Inc.*, 13 F. Supp. 2d 471 (S.D.N.Y. 1998)). In *Silvestro*, Dr. Berenson calculated the value of the plaintiff's lost household services, even though there was "no evidence that [plaintiff] performed any household services prior to the incident, and no evidence of what he is capable of performing since the accident." Slip op. at 10. Here, defendants do not suggest flaws of this magnitude. They have not asserted, for example, that Mrs. Hersko performed no household

services when she was alive or that she would have ceased performing these services had she survived. Indeed, to the extent that they rely on Dr. Schuster's report to calculate the value of Mrs. Hersko's services, defendants concede that she would have dedicated a significant amount of time to household tasks. Gov't Mem. at 16.

The court in *Mono* did not preclude Dr. Berenson's testimony. 13 F. Supp. 2d at 479. Indeed, in deciding defendants' motion to set aside the verdict, the court concluded that most of Dr. Berenson's testimony was well founded and properly admitted. The court nevertheless set aside the jury's award of damages for household services because the jury appeared to rely on Dr. Berenson's calculation and yet his calculation assumed that plaintiff performed 18 hours of household services per week, when there was only evidence of 14 hours. To the extent that defendants wish to raise a similar issue with respect to Dr. Berenson, they may do so at trial. *See Wechsler v. Hunt Health Sys., Ltd.*, 381 F. Supp. 2d 135, 140 (S.D.N.Y. 2003) ("A court considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context.").

F. Eva Rozman

Plaintiff proffers Eva Rozman as an expert on the "role played by a Jewish mother in an Ultra-Orthodox family, and in particular, the obligatory religious rituals, traditions and training which Rochel Hersko would have provided and

instilled upon her family, had she not died." Rozman Report at 1.[14] Although Rozman purports to opine as to the effect of Mrs. Hersko's death on the Hersko family, the report contains almost no information about Mrs. Hersko or any member of her family. The second paragraph of the 12-page report lists the family members' respective names and ages at the time of Mrs. Hersko's death, but the remainder of the report is devoid of any personal information about the Hersko family, including Mrs. Hersko.[15] *See generally* Rozman Report.

Rather than discuss the Hersko family, the report describes the practices and beliefs of Hasidic and Ultra-Orthodox families in general, with an emphasis on the role of the mother. (The report appears to use the terms "Orthodox," "Ultra-Orthodox," "Hasidic," and "Ultra-Orthodox Hasidic" interchangeably, without any explanation of the relationship between these terms or how these terms apply to the Herskos.[16]) Rozman writes, for example, that a "typical day for the Hasidic mother begins with the morning ritual of washing the hands with water prepared the night before; upon arising, the mother utters the Modeh Ani, prayer of thanks to the King

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[14] Because Rozman's report does not include page numbers, citations to page numbers refer to those generated by the Court's Electronic Case Files ("ECF") system.

[15] The admissibility of Rozman's testimony was not before Judge Dolinger. Indeed, plaintiff did not disclose his intention to call Rozman as an expert witness until he annexed her report to his papers opposing defendants' motion to strike. Judge Dolinger later granted plaintiff's request to make an out-of-time designation of Rozman as an expert witness. Mot. To Strike Order at 4.

[16] At Rozman's deposition, when asked whether the terms were used interchangeably in her report, she testified that they "probably are, yes." Deposition of Eva Rozman, dated Apr. 16, 2015 ("Rozman Dep. Tr."), at 28:6–12.

of Kings for returning her soul intact through His great mercy." *Id.* at 4–5. The mother then "arises and proceeds to ritually wash the hands of all of the children, or makes sure they wash by themselves." *Id.* at 5.

Rozman purports to describe the role of Hasidic Jewish mothers in raising their daughters. The report notes, for example, that "[o]ne of the primary roles of the Hasidic Jewish mother is to teach her daughters the intricacies and laws of keeping a strictly kosher kitchen, with separate pots, dishes, utensils and in most Hasidic homes, separate stoves and sinks." *Id.* at 8.

Rozman also discusses the impact of a mother's death on an Ultra-Orthodox family: "The loss of the Ultra-Orthodox Jewish mother, the central figure in providing instructional religious and cultural guidance, educational training and spiritual support, leaves the Orthodox family shattered, especially where there are young and impressionable children." *Id.* at 2. The report continues: "It is virtually impossible for a surviving Hasidic father to assume the role in the family as both father and mother; [sic] a role for which most Hasidic men are ill-prepared to fill." *Id.*

At her deposition, Rozman admitted that all of the information that she knew about the Hersko family came from counsel. Rozman Dep. Tr. at 67:13–23. Rozman never actually spoke to any Hersko family members, before or after Mrs. Hersko's death. *Id.* at 67:24–68:19. Nor did she speak with anyone in their community who knew them. *Id.* at 77:15–22. At her deposition, Rozman further admitted that she did not know whether Mrs. Hersko performed any of the practices described in her

report. *Id.* at 69:9–14, 97:3–8. Nor did Rozman know whether or how the practices she described have been carried out in the Hersko household since Mrs. Hersko's death. *Id.* at 120:19–121:7.

"In deciding whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos*, 303 F.3d at 267. Even if the Court were to assume that the content of Rozman's report is reliable and based on sufficient facts, she has failed to reliably apply her opinion to the facts of this case. *R.F.M.A.S.*, 748 F. Supp. 2d at 248–49 ("In assessing the reliability of expert testimony, the trial court must decide not only whether an expert's methodology is reliable for some purposes, but whether it is a reliable way 'to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.'") (quoting *Kumho Tire*, 526 U.S. at 154). At her deposition, Rozman admitted that she had "no knowledge, whatsoever, as to whether Mrs. Hersko did or did not perform any of the customs, practices and rituals that [she] describe[d] in her report." Rozman Dep. Tr. at 69:9–14.

In his opposition papers, plaintiff posits that the traditions described by Rozman "have been handed down from generation to generation" and "do not vary." Pl. Opp. at 3. The implication appears to be that no individual application is necessary because all Ultra-Orthodox families are the same. But plaintiff cites no authority for this proposition. Indeed, at her deposition, Rozman admitted that

"there are things that happen in certain Ultra-Orthodox Jewish households that may not happen in all Ultra-Orthodox households." *Id.* at 80:5–9.

Regarding the reliability of Rozman's opinions about Ultra-Orthodox families, the Court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. Although "an expert may rely on [her] experience as the basis for [her] opinion, that expert must explain how that experience leads to [her] proffered conclusion and why it provides a sufficient basis for it." *Faryniarz v. Nike, Inc.*, No. 00-CV-2623 (NRB), 2002 WL 1968351, at *3 (S.D.N.Y. Aug. 23, 2002).

Here, plaintiff has failed to explain why Rozman's experience is sufficient to permit her to testify as an expert on the practices and customs of Ultra-Orthodox families and on the impact of a mother's death in these families. Rozman testified that she considers herself to be an Ultra-Orthodox woman, and her résumé indicates that she has attended and worked for Jewish schools. Rozman Dep. Tr. at 28:13–15; Résumé, Dkt. No. 148-2, at 13. Although she attended one year of seminary school in the 1960's after graduating high school, she does not hold any advanced degrees. Judging from her deposition testimony, her report appears to be based on her everyday experiences and two books that she consulted "to make sure that [she] got the facts all right." *Id.* at 56:23–60:15, 108:17–110:23.

But the Court is not convinced that Rozman's everyday experience coupled with occasional references to two books qualifies her as an expert on the practices of Ultra-Orthodox families in general and the impact of a mother's death in these families in particular. Rozman has not adequately explained how her experience leads to or justifies her conclusions on these subjects. *See Reach Music Pub., Inc. v. Warner Chappell Music, Inc.*, 988 F. Supp. 2d 395, 401 (S.D.N.Y. 2013) ("'[I]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.'") (citations omitted). Without any such explanation, the Court believes that Rozman's testimony would amount to, at best, a series of impressionistic generalizations and, at worst, "cultural stereotyping . . . that should not be dignified as expert opinion." *United States v. Urie*, 183 F. App'x. 608, 611 (9th Cir. 2006) (upholding lower court's exclusion of testimony on basis that witness' qualifications as an expert were based only on the fact that he grew up in Nigeria and claimed to be "intimately familiar with Nigerian culture") (internal quotation marks and alternations omitted); *see also Jinro Am. Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1005–06 (9th Cir. 2001), *opinion amended on denial of reh'g*, 272 F.3d 1289 (9th Cir. 2001) ("[Purported . . . expert on Korean business culture and practices . . . was not a trained sociologist or anthropologist, academic disciplines that *might* qualify one to provide reliable information about the cultural traits and behavior patterns of a particular group of people of a given ethnicity or nationality. Rather,

[he] offered his impressionistic generalizations."); *In re Heparin Prod. Liab. Litig.*, No. 1:08-HC-600000 (JGC), 2011 WL 1059660, at *10 (N.D. Ohio Mar. 21, 2011) (concluding that purported expert is not "qualified to offer opinions about Chinese cultural norms, behavior and business conduct" as he "has no education or training as a cultural expert generally, or as an expert on Chinese culture specifically").

To the extent that the Herskos' religious and cultural practices are relevant to damages, lay witnesses who personally know the Herskos are better equipped than Rozman to testify as to how Mrs. Hersko's death disrupted these practices. The preclusion of Rozman's testimony has no bearing on lay witnesses' ability to testify to the Herskos' religious and cultural activities to the extent that they are relevant.

III. CONCLUSION

For the reasons stated above, defendants' motion is granted in full with respect to Dr. Adler and Rozman and partially granted with respect to Drs. Schuster and Berenson. If Drs. Schuster and Berenson testify, they may only testify to the value of Mrs. Hersko's household services.

The Clerk is directed to close Dkt. Nos. 130 and 142.

SO ORDERED.

Dated: New York, New York
October 20, 2016

JAMES L. COTT
United States Magistrate Judge