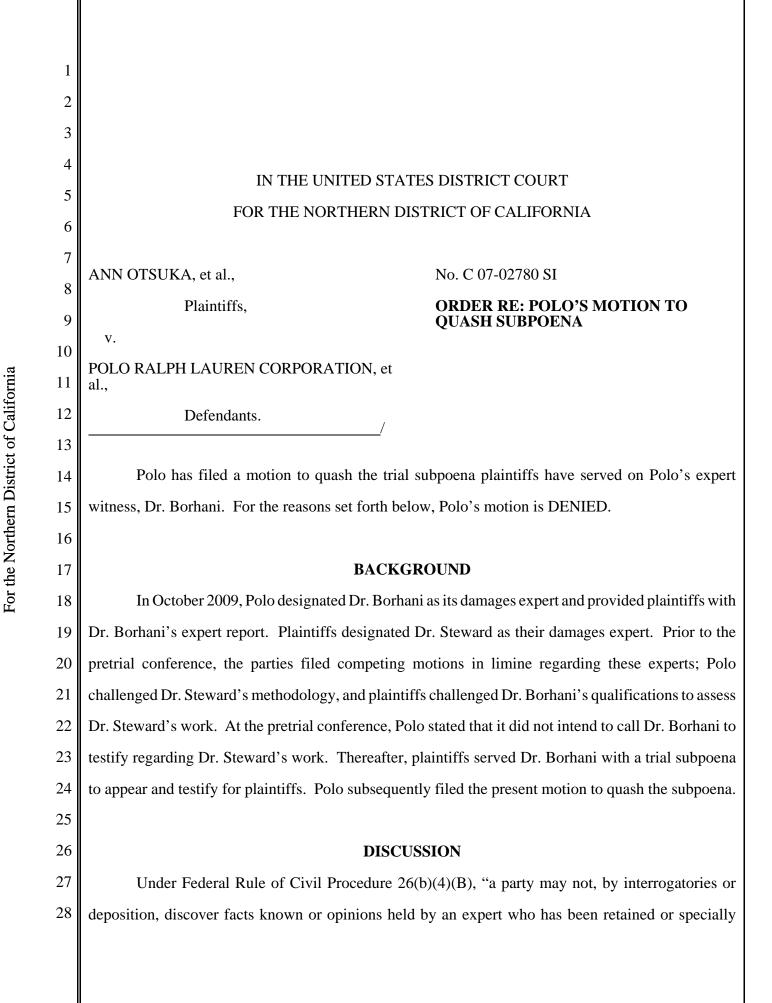
**United States District Court** 



employed by another party in anticipation of litigation or to prepare for trial and who is not expected 1 2 to be called as a witness at trial" unless the party can show "exceptional circumstances under which it 3 is impracticable for the party to obtain facts or opinions on the same subject by other means." By its 4 terms, this rule contemplates only consultative experts, not experts designated for trial. Several district 5 courts within this circuit, however, have applied the rule to prevent a party from calling an expert 6 witness whom the opposing party initially designated for trial, but subsequently decided not to call. See 7 FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1046 (E.D. Cal. 2002); Lehan v. Ambassador 8 Programs, Inc., 190 F.R.D. 670, 672 (E.D. Wash. 2000).

9 Polo's motion to quash does not expressly state that Polo will not call Dr. Borhani as a witness 10 at trial; Polo's papers state only that Polo "might not" call Dr. Borhani. Upon oral inquiry in open court 11 on March 16, 2010, Polo counsel again stated that he "did not know" whether he would call Dr. Borhani. 12 Under these circumstances, case law indicates that plaintiffs should be permitted to call Dr. Borhani 13 during their case-in-chief. See, e.g., Kerns v. Pro-Foam of S. Ala., Inc., 572 F. Supp. 2d 1303, 1311 14 (S.D. Ala. 2007) ("[C]ourts have repeatedly observed that once a party has given testimony through 15 deposition or expert reports, those opinions do not 'belong' to one party or another, but rather are 16 available for all parties to use at trial."). Thus, unless Polo is willing to commit to not calling Dr. 17 Borhani, plaintiffs are entitled to do so.

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Polo's motion to quash the trial subpoena served on Dr. Borhani is therefore DENIED.

IT IS SO ORDERED.

22 Dated: March 17, 2010

JIAA. Hestor

SUSAN ILLSTON United States District Judge

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