

1 **I. BACKGROUND**

2 In the Haught case, the court entered three stipulated protective orders regarding
3 the use of confidential information disclosed through discovery. The first two orders govern the
4 use and disclosure of documents relating to certain Anderson Police Department officers (see
5 Docs. 41 and 85 in 2:11-CV-1653-JAM-CMK). A third order extends the prior orders to cover
6 confidential materials related to Officer Miller, a defendant in the Knigheten action (see Doc. 90
7 in 2:11-CV-1653-JAM-CMK). With respect to disposition of confidential documents upon
8 termination of the Haught case, the parties agreed and the court ordered as follows:

9 Return/Destruction of Confidential Material. Upon final
10 termination of the Litigation, the Confidential Material, except for that
11 incorporated in pleadings, deposition transcripts, and the work product of
12 counsel, shall be destroyed or returned to CITY (emphasis added).

13 **II. DISCUSSION**

14 In the pending motion, defendants argue that plaintiff’s counsel has violated the
15 protective orders by not destroying or returning confidential documents following termination of
16 the Haught matter in January 2016. Defendants speculate that confidential documents are being
17 used “. . .to attempt to bolster Mr. Knigheten’s *Monell* claim against Defendant City of Anderson
18 in this case.” Defendants’ belief is based on plaintiff allegations of prior excessive force
19 complaints against Officer Miller set forth in paragraph 18 of the first amended complaint filed in
20 April 2016 (see Doc. 21 in 2:15-CV-1751-TLN-CMK). In paragraph 18, plaintiff alleges:

21 18. Prior to his assault on plaintiff KNIGHTEN, defendant
22 MILLER had been the subject of several excessive force complaints. In
23 spite of that fact, defendant CITY had advanced him in rank to Sergeant
24 and had made him the lead training officer. During the investigation into
25 the rape-kidnapping case, it came to light that much of the wrongful
26 behavior was done by officers who were MILLER’s direct subordinates
while he was on duty. In spite of that, he remained a Sergeant and lead
training officer, making about \$150,000.00 a year including overtime,
health insurance, and retirement. Defendant CITY has a small department
(less than 20 officers) so it is not plausible that he and other supervisors in
the department did not know about much of the misconduct. Still, nothing

1 was done to protect citizens from this out of control police force.

2 Defendants note that the allegations of prior excessive force complaints against defendant Miller
3 were not contained in the original complaint filed in the Knighen action in August 2015, and
4 first appear in the amended complaint filed in April 2016 after confidential documents were
5 produced in October and November 2015 in the Haught case.

6 Defendants seek: (1) an order requiring plaintiff's counsel to return the
7 confidential documents; (2) an order striking any allegations in plaintiff's first amended
8 complaint “. . .that were based upon or refer to the confidential materials”; and (3) an order
9 awarding attorneys' fees incurred in bringing the motion.

10 In opposition, plaintiff's counsel argues:

- 11 1. Defendants' counsel has precluded plaintiff's counsel from returning the
12 confidential documents because not all confidential documents are
13 marked, they are mixed in with thousands of pages of other documents,
and defendants' counsel has not responded to plaintiff's counsel's letter
seeking confirmation of which documents should be returned.
- 14 2. Sanctions are not warranted because no confidential materials were used in
15 the Knighen case.
- 16 3. The rules of professional conduct require plaintiff's counsel to maintain
17 client files, which in the Haught case include the confidential materials,
for five years.
- 18 4. Plaintiff's counsel must retain the confidential materials to cross-check
that none is used.

19 **Return of Confidential Documents** – Because the protective orders require
20 plaintiff's counsel to either return or destroy the confidential documents, plaintiff's non-return of
21 documents does not in and of itself violate the protective orders.

22 While plaintiff's counsel has not violated the Haught protective orders in the
23 manner suggested by defendants in their motion, plaintiff's counsel has nonetheless violated the
24 protective orders. Specifically, it is clear from plaintiff's counsel's filings that he has neither
25 returned nor destroyed the confidential materials following resolution of the Haught case. In
26 fact, plaintiff's counsel argues that he must be permitted to retain these documents essentially in

1 perpetuity. The court finds plaintiff counsel’s arguments unpersuasive.

2 Plaintiff’s counsel cites California Rule of Professional Conduct 4-100(B)(3) for
3 the proposition that he must maintain his files in the Haught case – including the confidential
4 materials – for five years. Rule 4-100(B)(3), however, requires attorneys to maintain “complete
5 records of all funds, securities, and other properties of a client. . . .” and to preserve such records
6 for five years. The rule does not require plaintiff’s counsel to retain the confidential materials.
7 Further, plaintiff’s counsel made no such objection at the time he signed the stipulated protective
8 orders.

9 Plaintiff’s counsel also argues that he must be permitted to retain the confidential
10 materials as the only means to cross-check that such materials are not used outside the Haught
11 case in violation of the protective orders. According to plaintiff’s counsel, during the course of
12 the Haught case he “had to get all of the pertinent information into his head” and he “cannot
13 separate the protected from the non-protected if he does not have the protected information to use
14 to remind him what *not* to disclose.” This argument is unpersuasive. All information has a
15 source which counsel must know for him to be aware of the information in the first place. Thus,
16 counsel should know what information was derived from non-protected sources without
17 reference to the confidential materials. Counsel’s apparent inability to keep his files in order is
18 not justification for violation of the protective orders.

19 Because plaintiff’s counsel has neither returned nor destroyed the confidential
20 materials produced in the Haught case despite termination of that case, he is in violation of the
21 court’s protective orders and will be sanctioned. Counsel will also be required to return and/or
22 destroy the confidential materials, maintain no copies of such materials, and so declare under
23 penalty of perjury.

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1 **III. CONCLUSION**

2 Accordingly, IT IS HEREBY ORDERED that:

3 1. Defendants' motion for sanctions (Doc. 31) is granted;

4 2. Within 10 days of the date of this order, plaintiff's counsel shall file a
5 declaration, signed under penalty of perjury, confirming that all confidential materials produced
6 in the Haught case have either been returned to defendants or destroyed;

7 3. A sanction in the amount of \$750.00 is imposed on plaintiff's counsel for
8 violation of the court's protective orders, such sanction to be paid by counsel to the court within
9 10 days of the date of this order;

10 4. Defendants' counsel may submit, within 10 days of the date of this order, a
11 declaration supporting an award of attorneys' fees.

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13 DATED: December 12, 2016

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15 **CRAIG M. KELLISON**
16 UNITED STATES MAGISTRATE JUDGE
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