

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMAZON.COM, INC.,

Plaintiff,

v.

DANIEL A. POWERS,

Defendant.

CASE NO. C12-1911RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on the motion of Plaintiff Amazon.com, Inc. (“Amazon”) for a preliminary injunction against Defendant Daniel Powers. Dkt. # 11. For the reasons stated below, the court GRANTS the motion in part and DENIES it in part. The court enters a limited preliminary injunction in Part IV of this order.

II. BACKGROUND

A. Mr. Powers Worked at Amazon for Two Years.

Amazon hired Mr. Powers in mid-2010 to serve as a vice-president in its Amazon Web Services (“AWS”) division. Unlike the consumer-targeting online shopping services for which Amazon initially became known, AWS caters to businesses. Mr. Powers was responsible for sales of Amazon cloud computing services. His customers were businesses who wanted to use Amazon’s vast network of computing resources for their own software development, data storage, web site hosting, and the like. Mr. Powers

1 was a Washington resident based at Amazon’s Seattle headquarters, although he traveled
2 extensively for his job.

3 Mr. Powers left Amazon effective July 1, 2012. No one disputes, however, that
4 the last day on which he had access to any internal Amazon information was June 18,
5 2012. Powers Decl. (Dkt. # 16) ¶¶ 15-16. When he left Amazon, he took no documents
6 in paper or electronic form. *Id.* ¶ 16. There is no evidence that, at the time of his
7 departure, he had specific plans to work elsewhere.

8 **B. Mr. Powers Signs Amazon’s Noncompetition Agreement.**

9 When Mr. Powers started working at Amazon, he signed a “Confidentiality,
10 Noncompetition and Invention Assignment Agreement.” Selipsky Decl. (Dkt. # 6), Ex. B
11 (“Agreement”). The Agreement has four components that bear on this dispute.

12 The first component is a broad prohibition against Mr. Powers’ disclosure of what
13 the Agreement deems “Confidential Information.” Confidential Information includes,
14 but is not limited to, the identity of Amazon’s customers, “data of any sort compiled by
15 [Amazon],” including marketing data and customer data, techniques for identifying
16 prospective customers and communicating with prospective or current customers, current
17 or prospective marketing or pricing strategies, plans for expansion of products or
18 services, and “any other information gained in the course of the Employee’s employment
19 . . . that could reasonably be expected to prove deleterious to [Amazon] if disclosed to
20 third parties” Agr. ¶ 2(a)(i)-(xi). Once an employee learns “Confidential
21 Information,” he can never disclose it to anyone. Agr. ¶ 2(b)(i). The only relevant
22 exception is for information that is in the public domain. Agr. ¶ 2(b)(ii).

23 The second component of the Agreement is a ban on Mr. Powers doing business
24 with Amazon’s customers or prospective customers for 18 months after his departure
25 from Amazon. Agr. ¶ 2(c)(ii). The ban applies in any business relationship with an
26 Amazon customer where Mr. Powers would provide a similar product or service to one
27

1 that Amazon provides. *Id.* More broadly, the ban applies to any relationship with an
2 Amazon customer where the relationship “would be competitive with or otherwise
3 deleterious to the Company’s own business relationship or anticipated business
4 relationship” with the customer. *Id.*

5 The third component is an 18-month ban on Mr. Powers working in any capacity
6 that competes with Amazon. The ban prevents him from offering a product or service in
7 any “retail market sector, segment, or group” that Amazon did business with or planned
8 to do business with prior to his last day at Amazon, provided that the product or service
9 he offers is “substantially the same” as one that Amazon provides. Agr. ¶ 3(c)(iii).

10 Taken literally, the ban has extraordinary reach: it would, for example, prevent Mr.
11 Powers from working for a bookseller, even though he had nothing to do with Amazon’s
12 book sales while he worked there.

13 The fourth component is a 12-month ban, measured from Mr. Powers’ last day of
14 employment, on hiring or employing former Amazon employees. Agr. ¶ 3(b).

15 When Mr. Powers left Amazon, he received a substantial severance payment and
16 signed a severance agreement. The severance agreement reiterates his obligations under
17 the Agreement, but changes none of them. Selipsky Decl., Ex. C. Amazon insists that it
18 made the severance payment to reinforce the Agreement, but it offers little evidence to
19 support that claim. It is just as likely that it paid Mr. Powers to settle disputes over his
20 termination and Amazon stock he would have received if he had kept his job.

21 **C. Mr. Powers Started Work at Google Three Months After He Left Amazon.**

22 Google, Inc., hired Mr. Powers in September 2012 to work as its Director of
23 Global Cloud Platform Sales at its Mountain View, California headquarters. Powers
24 Decl., Ex. C. As a result of this litigation, he now uses the title “Director, Google
25 Enterprise,” Nair Decl. (Dkt. # 17) ¶ 3, and he has agreed not to use a title that refers to
26 cloud computing until the end of 2012. Petrak Decl. (Dkt. # 18), Ex. D.

1 Although Mr. Powers job at Google will resemble his job at Amazon in some
2 respects, the extent of that similarity is difficult to gauge on this record. The parties agree
3 that part of Mr. Powers' job will be to oversee sales of Google products that do not
4 compete with AWS offerings. In part, however, Google intends that he oversee sales of
5 its cloud computing services. Amazon has pointed to three specific Google products
6 (Google App Engine, Google Cloud Storage, and Google Compute Engine) that compete
7 with various AWS products. Selipsky Decl. ¶¶ 5, 23, 28-30. Amazon has provided
8 relatively little information, however, that would permit the court to assess the nature of
9 that competition. On this record, the court can only say that Google has a variety of
10 cloud services that it hopes to sell in approximately the same market in which AWS
11 operates. The parties dispute, for example, whether Google App Engine competes with
12 any AWS product. There is little evidence that would permit the court to assess the
13 extent to which Mr. Powers' experience marketing Amazon's products would be useful
14 in marketing Google's competing products. According to Mr. Powers, Google's cloud
15 services are sufficiently distinct from Amazon's that his experience with Amazon
16 services will be of little use to him at Google. Powers Decl. ¶¶ 22-25.

17 **D. Google Has Temporarily Restricted Mr. Powers' Cloud Computing Work.**

18 Before he began work on September 24, Google sent Mr. Powers a written job
19 offer. The offer acknowledged his prior employment and imposed several restrictions. It
20 stated that he was never to use or disclose any "confidential, proprietary, or trade secret
21 information" of any prior employer. Powers Decl., Ex. C. It also restricted him from
22 cloud computing work for his first six months at Google:

23 [D]uring the first six months of your employment with Google, your
24 activities will not entail participation in development of, or influencing,
25 strategies related to product development in the areas of cloud compute,
26 storage, database or content delivery networks products or services, other
27 than to provide those involved in such matters with publicly available
28 market research or customer feedback regarding Google's existing products
generated after you commence work at Google.

1 *Id.* It also prevented him from working with his Amazon customers:

2 During the first six (6) months from your last date of employment with
3 your current employer, you and Google also agree that you will not
4 participate, directly or indirectly, in sales or marketing to any customers of
5 your prior employer that, to the best of you[r] memory, you had material
6 direct contact or regarding whom you reviewed confidential information of
7 your prior employer.

8 *Id.* It prohibited him from being “directly or indirectly involved in the hire of any current
9 or former employee of your prior employer” for the twelve months following his
10 departure from Amazon. *Id.*

11 When Amazon discovered that Mr. Powers had begun working at Google, it began
12 discussions with Google about his new job. Google voluntarily disclosed Mr. Powers
13 new responsibilities as well as the restrictions it had already imposed on his employment.

14 Google’s voluntary restrictions did not satisfy Amazon. It sued Mr. Powers for
15 breach of the Agreement (and the severance agreement) and violation of Washington’s
16 version of the Uniform Trade Secrets Act (“Trade Secrets Act,” RCW Ch. 19.108). It
17 also raised a claim for a breach of the common law duties of confidentiality and loyalty,
18 although it does not mention that claim in the motion before the court. Amazon first sued
19 in King County Superior Court and sought a temporary restraining order. Mr. Powers
20 removed the case to this court in late October, before the state court took any action.

21 After the case arrived here, the parties negotiated in an attempt to reach an
22 agreement that would permit them to fully brief a motion for a preliminary injunction,
23 rather than battling over an expedited temporary restraining order. They ultimately
24 agreed that, until the end of 2012, Mr. Powers would comply with the terms of Google’s
25 offer letter, that he would refrain from sales, marketing, or strategy for a specific list of
26 Google products and services, that he would not solicit Amazon Web Services customers
27 who he worked with or about whom he had confidential information, and that his title at
28

1 Google would not refer to cloud computing.¹ Petrak Decl., Ex. D. Mr. Powers offered to
2 participate in expedited discovery in advance of a preliminary injunction motion. *Id.*
3 Amazon refused. *Id.*

4 Amazon asks for a five-part injunction. Proposed Injunction (Dkt. # 11-1) at 7-8.
5 It would prohibit Mr. Powers from disclosing Amazon's confidential information or trade
6 secrets. *Id.* at 7. It would prevent him from engaging in "any activity that directly or
7 indirectly supports any aspect of Google's cloud computing business that competes with
8 Amazon's cloud computing business," including but not limited to the three specific
9 Google products that allegedly compete with Amazon cloud products. *Id.* He would not
10 be able to solicit "any customer or prospect of Amazon's cloud computing business with
11 whom he had direct contact or regarding whom he received confidential information
12 while employed by Amazon." *Id.* He would not be able to solicit or recruit any "current
13 Amazon employees." *Id.* Finally, the injunction would require him to return anything
14 that he took from Amazon.

15 III. ANALYSIS

16 The court may issue a preliminary injunction where a party establishes (1) a
17 likelihood of success on the merits, (2) that it is likely to suffer irreparable harm in the
18 absence of preliminary relief, (3) that the balance of hardships tips in its favor, and (4)
19 that the public interest favors an injunction. *Winter v. Natural Resources Defense*
20 *Council, Inc.*, 555 U.S. 7, 20 (2008). A party can also satisfy the first and third elements
21 of the test by raising serious questions going to the merits of its case and a balance of
22
23

24 ¹ Before Amazon objected to Mr. Powers' employment at Google, Google voluntarily kept him
25 from working in cloud computing until six months after his employment began, or about the end
26 of March 2013. Amazon's negotiation for restrictions in connection with this litigation led
27 Google to promise no restrictions beyond the end of 2012. It is not clear whether Google will
28 continue its restrictions beyond the end of this year; in any event, Google's choice would not
impact the court's decision today.

1 hardships that tips sharply in its favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
2 1127, 1131 (9th Cir. 2011).²

3 With this standard in mind, the court quickly eliminates two aspects of the
4 injunction Amazon requests. The first is a prohibition on Mr. Powers “[s]oliciting or
5 recruiting any current Amazon employees.”³ Proposed Injunction (Dkt. # 11-1) at 7.
6 There is no evidence that Mr. Powers has attempted to recruit Amazon employees. There
7 is no evidence that he intends to do so. Google has already forbidden him to do so for the
8 first 12 months following his departure from Amazon. This is, probably not
9 coincidentally, the same 12-month restriction the Agreement imposes on Mr. Powers. On
10 this record, no one could conclude that it is likely that Mr. Powers will solicit Amazon
11 employees, and no one could conclude that Amazon will suffer any harm, much less
12 irreparable harm.

13 Similarly, the court cannot impose an injunction that requires Mr. Powers to return
14 all Amazon “property, documents, files, reports, work product, and/or other
15 materials” Proposed Injunction (Dkt. # 11-1) at 8. There is not a shred of evidence
16 that Mr. Powers has any Amazon documents or anything else belonging to Amazon. Mr.
17 Powers denies that he took anything from Amazon when he left. Powers Decl. ¶ 16.
18 Amazon has not even raised serious questions going to the merits of this claim.

20 ² *Winter* overruled Ninth Circuit law that permitted a party to obtain a preliminary injunction
21 merely by proving a “possibility” of irreparable harm. 555 U.S. at 22. Ninth Circuit panels
22 initially raised questions over the scope of the *Winter* ruling. See *Shepherd v. Weldon Mediation*
23 *Servs., Inc.*, 794 F. Supp. 2d 1173, 1176-77 (W.D. Wash. 2011) (reviewing cases). It now
24 appears settled that *Winter* did not “change the requisite showing for any individual factor [in the
25 preliminary injunction analysis] other than irreparable harm.” *Small v. Avanti Health Sys., LLC*,
26 661 F.3d 1180, 1187 (9th Cir. 2011).

27 ³ Amazon asked for an injunction that would prohibit Mr. Powers from “[s]oliciting or
28 recruiting” Amazon employees. The Agreement, by contrast, is much more broad. It would
prohibit Mr. Powers (and arguably Google itself) from employing any Amazon employee,
regardless of who (if anyone) solicited or recruited the employee to work at Google. Amazon’s
insistence that the Agreement imposes “narrow” restrictions is frequently at odds with the
language of the Agreement.

1 **A. Amazon is Not Likely to Succeed on the Merits of Its Claims Regarding**
2 **Disclosure of Its Confidential Information or Trade Secrets.**

3 The court's observation that there is no evidence that Mr. Powers took any
4 documents from Amazon is a good place to begin its evaluation of the proposed
5 injunction's restrictions on disclosure. If Mr. Powers took any confidential or trade
6 secret information from Amazon, he took it in his memory alone.

7 The sole evidence Amazon offers to support its claim that Mr. Powers remembers
8 its confidential information is the declaration of Adam Selipsky, Mr. Powers' supervisor
9 at Amazon. Selipsky Decl. ¶¶ 9-17. Although Mr. Selipsky asserts that Mr. Powers
10 "knows" things about Amazon, he does not acknowledge that he can only speculate about
11 what Mr. Powers knows now, more than six months after the last day he had access to
12 any internal Amazon information. Amazon declined the opportunity to engage in
13 discovery that would have at least allowed it to determine what Mr. Powers still knows.

14 Mr. Selipsky shows that it is likely that Mr. Powers does not know much of the
15 "secret" information Amazon is concerned about. Mr. Selipsky cannot be certain that
16 Mr. Powers *ever* knew some of that information. For example, he contends that Mr.
17 Powers' knowledge about Amazon customers is not limited to customers with whom he
18 had contact, because he had "access to Amazon's confidential and highly detailed
19 customer relationship management database." Selipsky Decl. ¶ 12. Mr. Selipsky does
20 not say that Mr. Powers ever used this database. He does not explain how, even if Mr.
21 Powers used the database, he could remember data he gleaned from it at least six months
22 ago. He declares that Mr. Powers received a weekly report with "hundreds of pages
23 worth of detailed business statistics for AWS as a whole and for its individual products
24 and services" *Id.* ¶ 15. It is not likely that Amazon will prove at trial that Mr.
25 Powers remembers more than a sliver of the information contained in hundreds of pages.

26 It is likely that Mr. Powers remembers something from his time at Amazon. He
27 no doubt remembers many of the customers with whom he dealt directly, and probably

1 remembers significant details of the relationships between those customers and Amazon.
2 He probably remembers more, but the court declines to speculate. Amazon had both the
3 burden to provide evidence of what Mr. Powers knows and the opportunity to take
4 discovery to get additional evidence. That it has not done so, even as Google and Mr.
5 Powers have given ample time to pursue discovery by voluntarily imposing virtually
6 every restriction Amazon seeks in its injunction, is a damaging blow to Amazon's effort
7 to demonstrate a likelihood of success on the merits.

8 Not only does the court not know what Mr. Powers remembers, the court does not
9 know whether what he remembers is useful. AWS apparently conducts "formal
10 operations planning processes" every six months, during which AWS departments give
11 "detailed presentations" on plans, strategy, and budget. Selipsky Decl. ¶ 16. Amazon
12 excluded Mr. Powers from the AWS meetings that happened this past summer. Powers
13 Decl. ¶ 15. Assuming that Mr. Powers attended the meetings six months prior (there is
14 no direct evidence that he did), that means that the strategic information Mr. Powers
15 acquired, if he remembers it, is at least a year old. Mr. Selipsky emphasizes weekly
16 emails and reports that Mr. Powers received (Selipsky Decl. ¶ 17), which serves equally
17 well to emphasize that Mr. Powers has had no access to this weekly material for at least
18 27 weeks. Perhaps Amazon's cloud computing business is structured so that even
19 information that is as much as a year old remains competitively sensitive, but again, the
20 court can only speculate. Putting aside Mr. Powers' relationships with Amazon
21 customers, Amazon has provided no compelling evidence that Mr. Powers still
22 remembers competitively sensitive information he learned at Amazon.

23 Relying on this hazy evidence of what Mr. Powers knows, Amazon invokes the
24 Agreement's non-disclosure provisions and the Trade Secrets Act to prevent Mr. Powers
25 from revealing his knowledge. For several reasons, Amazon is not likely to succeed in
26 this effort, at least on the record before the court.

1 Amazon is not likely to prevail on its trade secret claim. First, with the possible
2 exception of confidential information relating to its cloud computing customers, Amazon
3 has not identified any trade secrets that Mr. Powers currently knows. *See Ed Nowogroski*
4 *Ins., Inc. v. Rucker*, 971 P.2d 936, 942 (Wash. 1999) (“A plaintiff seeking damages for
5 misappropriation of a trade secret . . . has the burden of proving that legally protectable
6 secrets exist.”). Amazon did not ask to file any evidence under seal, suggesting that it
7 believes the court will divine what information is a trade secret from Mr. Selipsky’s
8 public declaration. Having scoured that declaration, the court is unable to do so. The
9 court acknowledges that it is likely that Mr. Powers learned information that would
10 qualify as a trade secret while he was at Amazon. *See* RCW § 19.108.010(4) (defining
11 trade secret as a information that derives “independent economic value” from being
12 neither known nor readily ascertainable and that is subject to reasonable efforts to
13 maintain its secrecy). But if there is trade secret information that Mr. Powers could still
14 be expected to know, Amazon has not identified it.

15 The possible exception is trade secret information about Amazon’s customers.
16 Mr. Powers admits that he worked closely with 33 AWS customers. Powers Decl. ¶ 21.
17 The *identity* of those customers is likely not a secret. Mr. Powers’ un rebutted evidence
18 shows that Amazon publicly identifies all of those entities as Amazon customers. *Id.*
19 Although a customer list can be a trade secret, *see Ed Nowogroski Ins.*, 971 P.2d at 440,
20 Amazon has not identified a customer list or subset of a customer list that qualifies as a
21 trade secret. It is possible, however, that Mr. Powers remembers trade secret information
22 about Amazon’s relationships with those customers. In contrast to the enormous sets of
23 AWS data that Amazon speculates Mr. Powers still remembers, it is far more likely that
24 he remembers information pertaining to these relatively few customers.

25 Even if Mr. Powers knows trade secret information about Amazon’s relationship
26 with a few customers, Google has not identified what that information is. As the court

1 will discuss later, Washington law permits noncompetition agreements that prevent an
2 employee from trading unfairly on customer relationships he or she built before leaving
3 employment. An employer cannot weave a similar restriction from a nondisclosure
4 agreement or the Trade Secret Act without identifying confidential or trade secret
5 information with sufficient specificity. Amazon has failed to do so here. Indeed,
6 Amazon has not identified even one of the customers about which it is so concerned,
7 much less any specific confidential information Mr. Powers knows about that customer.

8 Amazon's claims based on the nondisclosure clauses of the Agreement fail for the
9 same reasons as its trade secret claim. Amazon has not discharged its burden to identify
10 confidential information that Mr. Powers *still* knows and is still competitively useful.

11 Even if Amazon had sustained its burden to identify confidential or trade secret
12 information that Mr. Powers knows, it would still need to prove a threat of irreparable
13 harm. Evidence of what Mr. Powers knows is not enough; Amazon also needs evidence
14 that Mr. Powers is likely to disclose it. That Mr. Powers knows something is not proof
15 that he will use that knowledge at Google. Google has already forbidden him to ever use
16 Amazon's confidential information. Amazon's counsel conceded at oral argument that
17 Amazon has no evidence that Mr. Powers has disclosed anything in the nearly three
18 months since he began working at Google. Once Google lifts its self-imposed restrictions
19 on Mr. Powers' work with its cloud computing products, Mr. Powers may have more
20 opportunity to use what he knows about Amazon. It is that possibility that garners much
21 of Amazon's attention. Amazon has generally failed to point to anything specific that
22 Mr. Powers knows that he is likely to disclose at Google. It instead asserts that virtually
23 everything Mr. Powers knows is confidential and that because of the nature of his job at
24 Google, he must inevitably use or disclose that knowledge in his work there. Mr. Powers
25 decries Amazon's approach as an impermissible "inevitable disclosure" argument.

1 Amazon has not proffered evidence from which the court can conclude that it is
2 likely that Mr. Powers will “inevitably disclose” Amazon’s confidential information.
3 The parties debate whether Washington has ever recognized inevitable disclosure as a
4 viable basis for a trade secret or breach of confidentiality claim. On this record, that
5 debate is largely beside the point. The crux of an inevitable disclosure argument in this
6 context is a showing that an employee’s new job so closely resembles her old one that it
7 would be impossible to work in that job without disclosing confidential information.
8 Amazon has not made that showing here. It has pointed to a host of at least superficial
9 similarities between Mr. Powers’ old job and his new one, including a set of superficial
10 similarities between Google’s App Engine, Cloud Storage, and Compute Engine services
11 and comparable AWS offerings. This effort falls short of convincing the court that Mr.
12 Powers cannot do his new job without relying on Amazon’s confidential information.

13 The court emphasizes the high bar for an inevitable disclosure argument for two
14 reasons. First, if an employer cannot make a detailed showing of similarity between an
15 employee’s new job and old job, then it can hardly argue that disclosure is inevitable.
16 Amazon’s inevitable disclosure argument fails in this case for at least that reason. More
17 importantly, however, an employer may lawfully prohibit an employee from *ever*
18 disclosing its confidential information. Were inevitable disclosure as easy to establish as
19 Amazon suggests in its motion, then a nondisclosure agreement would become a
20 noncompetition agreement of infinite duration. As the court will now discuss in its
21 analysis of the noncompetition clauses of the Agreement, Washington law does not
22 permit that result.

23 **B. With the Exception of Restrictions on Work with Former Customers,**
24 **Amazon is Not Likely to Succeed on the Merits of Its Effort to Enforce the**
25 **Noncompetition Clauses in the Agreement.**

26 The Agreement contains a choice-of-law clause selecting Washington law, under
27 which an agreement that restricts a former employee’s right to compete in the

1 marketplace is enforceable only if reasonable. The court will consider Mr. Powers' effort
2 to avoid the choice-of-law clause in Part III.C. For now, the court applies Washington
3 law, under which a court deciding whether a noncompetition agreement is reasonable
4 must consider three factors:

5 (1) whether restraint is necessary for the protection of the business or
6 goodwill of the employer, (2) whether it imposes upon the employee any
7 greater restraint than is reasonably necessary to secure the employer's
8 business or goodwill, and (3) whether the degree of injury to the public is
9 such loss of the service and skill of the employee as to warrant
10 nonenforcement of the covenant.

11 *Perry v. Moran*, 748 P.2d 224, 228 (Wash. 1987). If a court finds a restraint
12 unreasonable, it can modify the agreement by enforcing it only "to the extent reasonably
13 possible to accomplish the contract's purpose." *Emerick v. Cardiac Study Ctr., Inc.*, 286
14 P.3d 689, 692 (Wash. Ct. App. 2012). Among other things, the court can reduce the
15 duration of an unreasonably long anticompetitive restriction. *See, e.g., Perry*, 748 P.2d at
16 231 ("It may be that a clause forbidding service [to former clients] for a 5-year period is
17 unreasonable as a matter of law . . ."); *Armstrong v. Taco Time Int'l, Inc.*, 635 P.2d
18 1114, 1118-19 (Wash. Ct. App. 1981) (cutting five-year restriction to two and a half
19 years). In any case, the court should protect an employer's business only "as warranted
20 by the nature of [the] employment." *Emerick*, 286 P.3d at 692.

21 Applying these principles, Washington courts have typically looked favorably on
22 restrictions against working with an employee's former clients or customers. In *Perry*,
23 the court upheld a 20-accountant firm's noncompetition agreement preventing a departing
24 employee from working with her former clients for about a year and a half after she left
25 the firm.⁴ 748 P.2d at 224. The court recognized the employer's "legitimate interest in
26 protecting its existing client base," and rejected the notion that lesser restrictions, like one

27 ⁴ As written, the restrictive covenant in *Perry* would have lasted five years. 748 P.2d at 225. At
28 trial, however, the employer sought to enforce it solely as to the year and a half between the
employee's departure and trial. *Id.* at 231. For that reason, the court declined to decide whether
a five-year restriction was too long. *Id.* at 230-31.

1 that would only prohibit the former employee from soliciting (as opposed to working
2 with) former clients, would be adequate to protect that interest. *Id.* at 229. Generally
3 speaking, time-limited restrictions on business with former clients or customers survive
4 scrutiny in Washington. *See, e.g., Knight, Vale & Gregory v. McDaniel*, 680 P.2d 448,
5 451-52 (Wash. Ct. App. 1984) (declining to invalidate three-year restriction on
6 accountant working with former clients); *Pac. Aerospace & Elecs., Inc. v. Taylor*, 295 F.
7 Supp. 2d 1205, 1218 (E.D. Wash. 2003) (finding two-year restriction on solicitation of
8 former customers to be reasonable as a matter of law); *Seabury & Smith, Inc. v. Payne*
9 *Fin. Group, Inc.*, 393 F. Supp. 2d 1057, 1063 (E.D. Wash. 2005) (finding one-year
10 restriction on working with former clients to be reasonable as a matter of law); *see also*
11 *Labor Ready, Inc. v. Williams Staffing, LLC*, 149 F. Supp. 2d 398, 408 (N.D. Ill. 2001);
12 (applying Washington law, upholding one-year ban on working with former customers).

13 Washington courts have been more circumspect when considering restrictions that
14 would prevent an employee from taking on any competitive employment. These general
15 restrictions on competition are more suspect than mere bans on working with former
16 clients or customers. *Perry*, 748 P.2d at 230. Courts will in some circumstances enforce
17 general noncompetition restrictions when they apply only in a limited geographical area.
18 *See, e.g. Emerick*, 286 P.3d at 693-95 (remanding for reconsideration of necessity of five-
19 year ban on competitive employment in a single county); *Hometask Handyman Servs.,*
20 *Inc. v. Cooper*, No. C07-1282RSL, 2007 U.S. Dist. LEXIS 84708, at *10-11 (W.D.
21 Wash. Oct. 30, 2007) (granting injunction against former franchisee based on general
22 competition restriction, but reducing area from 100-mile radius to 25-mile radius); *see*
23 *also Labor Ready*, 149 F. Supp. 2d at 408 (N.D. Ill. 2001) (upholding one-year general
24 bar on competition within 10-mile radius of former employer). Courts have also declined
25 to enforce even geographically limited general restrictions on competition. *See A Place*
26 *for Mom, Inc. v. Leonhardt*, No. C06-457P, 2006 U.S. Dist. LEXIS 58990, at *6-7, 13-14

1 (W.D. Wash. Aug. 4, 2006) (declining to issue injunction based on general restriction on
2 competitive employment).

3 When a noncompetition agreement is targeted at a competing business, rather than
4 an individual employee, specific circumstances can justify a general bar on competition.
5 For example, in *Oberto Sausage Co. v. JBS S.A.*, C10-2033RSL, 2011 U.S. Dist. LEXIS
6 33077 (W.D. Wash. Mar. 11, 2011), the court considered a meat retailer's request for a
7 pre-arbitration injunction against a Brazilian meat processor who had formerly supplied
8 meat exclusively to the retailer. In that case, the retailer had worked closely with the
9 Brazilian processor to teach its proprietary beef jerky manufacturing process. *Id.* at *3.
10 When one of its chief competitors purchased the Brazilian processor, the court enforced a
11 general restriction on competition within the United States, preventing its competitor
12 from "taking a free ride on its substantial investment in training [Brazilian] employees
13 and upgrading the [Brazilian plant] with equipment plaintiff claims it developed through
14 its confidential research and development." *Id.* at *18. The court imposed the injunction
15 only for the length of time it took the parties to present their dispute to an arbitrator. *Id.*
16 at *22. Similarly, in *Armstrong*, the court upheld a restriction on a former franchisee
17 opening competing restaurants near the franchisor's restaurants, but it cut the five-year
18 duration of the restriction in half. 635 P.2d at 1118-19.

19 The court distills a few general principles from these cases. First, Washington
20 courts are relatively deferential to employers in enforcing agreements restricting a former
21 employee's work with the employer's clients or customers. Courts are less deferential to
22 general restrictions on competition that are not tied to specific customers. An employer
23 can demonstrate that more general restrictions are necessary, but can do so only by
24 pointing to specific information about the nature of its business and the nature of the
25 employee's work. Finally, although courts are somewhat deferential about the duration
26 or geographic extent of noncompetition agreements, they will readily shorten the duration

1 or limit the geographic scope, especially where the employer cannot offer reasons that a
2 longer or more expansive competitive restriction is necessary. With these principles in
3 mind, the court considers the Agreement's 18-month restriction on working with former
4 Amazon customers and its 18-month general noncompetition clause.

5 The Agreement passes muster under Washington law to the extent it seeks to
6 prevent Mr. Powers from working with his former Amazon customers. Mr. Powers, no
7 less than the employees in *Perry, Knight*, and in other Washington cases, competes
8 unfairly with Amazon to the extent he attempts to trade at Google on customer
9 relationships he built at Amazon. The reasonable duration of that restriction, however, is
10 a matter of dispute. This is not a case where Mr. Powers seeks to leap from Amazon
11 immediately to Google with his former customers in tow. He stopped working with
12 Amazon customers more than six months ago. There is no evidence he has had contact
13 with any of them since then. There is no direct evidence that he intends to pursue
14 business with any of them. The only indirect evidence that he has interest in contacting
15 his former customers is that he has chosen to fight Amazon's efforts to enforce the
16 Agreement. Although the personal aspects of his relationships with his former customers
17 might be expected to endure for more than six months, they might just as well extend
18 even beyond the 18-months that the Agreement provides. Amazon has not explained
19 why it selected an 18-month period, nor has it disputed Mr. Powers' suggestion that the
20 Agreement he signed is a "form" agreement that Amazon requires virtually every
21 employee to sign. Because Amazon makes no effort to tailor the duration of its
22 competitive restrictions to individual employees, the court is not inclined to defer to its
23 one-size-fits-all contractual choices. Amazon has not convinced the court that the aspects
24 of Mr. Powers' relationships with customers that depend on confidential Amazon
25 information are still viable today. On this record, the court finds it would not be
26
27
28

1 reasonable to enforce the Agreement's customer-based restrictions for longer than nine
2 months from the last date on which Mr. Powers had access to Amazon's information.

3 The Agreement's general noncompetition clause, in contrast to the clause targeting
4 Amazon customers, is not reasonable. Amazon asks the court to prevent Mr. Powers
5 from working in a competitive capacity anywhere in the world. The court is willing to
6 assume, even though Amazon has provided no evidence, that the cloud computing
7 business in which Google and Amazon compete is geographically far-flung. Because
8 both companies compete globally, it is possible that Mr. Powers could inflict competitive
9 injury on Amazon even while working a thousand miles from his Seattle-based former
10 employer. But even if the court accepts the extraordinary geographic reach of the ban, it
11 could not accept Amazon's implicit argument that it is impossible for Mr. Powers to
12 compete fairly with Amazon in the cloud computing sector.

13 Amazon has failed to articulate how a worldwide ban on cloud computing
14 competition is necessary to protect its business. Its ban on working with former
15 customers serves to protect the goodwill it has built up with specific businesses. A
16 general ban on Mr. Powers' competing against Amazon for other cloud computing
17 customers is not a ban on *unfair* competition, it is a ban on competition generally.
18 Amazon cannot eliminate skilled employees from future competition by the simple
19 expedient of hiring them. To rule otherwise would give Amazon far greater power than
20 necessary to protect its legitimate business interest. No Washington court has enforced a
21 restriction that would effectively eliminate a former employee from a particular business
22 sector. This court will not be the first, particularly where Amazon has not provided
23 enough detail about the nature of AWS's cloud computing business to convince it that an
24 employee like Mr. Powers can only compete with AWS by competing unfairly.

25 Much of Amazon's argument in favor of enforcement of its general restriction on
26 competition is cribbed from the inevitable disclosure argument it advanced in support of

1 the Agreement's nondisclosure provisions. According to Amazon, Mr. Powers simply
2 knows too much to compete fairly with Amazon in the cloud computing sector. The
3 court finds these claims to be fatally nonspecific, as it explained in Part III.A.
4 Generalized claims that a former employee cannot compete fairly are insufficient. *See*
5 *Copier Specialists, Inc. v. Gillen*, 887 P.2d 919, 920 (Wash. Ct. App. 1995) (finding that
6 the "training [an employee] acquired during his employment, without more," did not
7 warrant enforcement of a geographically limited covenant not to compete). Before
8 enforcing a general restriction against competition, the court would require a far more
9 specific showing than Amazon has made here.⁵

10 **C. Washington Law, not California Law, Applies to Amazon's Claims Based on**
11 **the Agreement.**

12 The court briefly addresses Mr. Powers' contention that California law, not
13 Washington law, should apply to this dispute. The court considers that contention only as
14 it applies to Amazon's claims based on the Agreement. No one has articulated a choice-
15 of-law argument as applied to Amazon's Trade Secret Act claim, and the court need not
16 consider that issue in light of its disposition today.

17 Because the court exercises diversity jurisdiction in this case, it applies
18 Washington's choice-of-law rules. *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002).
19 The threshold question in a Washington choice-of-law analysis is whether there is an
20 actual conflict with another state's law. *Burnside v. Simpson Paper Co.*, 864 P.2d 937,
21 942 (Wash. 1994); *see also Alaska Nat'l Ins. Co. v. Bryan*, 104 P.3d 1, 5 (Wash. Ct. App.
22 2004) (placing burden on party favoring another state's law to establish conflict with
23 Washington law). The court assumes without deciding that Mr. Powers correctly asserts
24 that even the Agreement's restrictions on working with former customers would be
25 unenforceable under California's more pro-employee approach to noncompetition

26 ⁵ The court's disposition today makes it unnecessary to resolve Mr. Powers' contention that the
27 noncompetition clause in the Agreement applies only to retail markets for consumer goods, and
28 thus has no application to the sale of cloud computing services to businesses.

1 agreements. *See, e.g., Google, Inc. v. Lee*, 415 F. Supp. 2d 1018, 1022 (N.D. Cal. 2005)
2 (comparing Washington and California law). Amazon does not argue otherwise.

3 Having identified a conflict of law, Washington choice-of-law rules require the
4 court to consider the Agreement's choice of Washington law. Agr. ¶ 9. Washington
5 courts apply § 187 of the Restatement (Second) Conflict of Laws ("§ 187") when
6 resolving "conflict of laws problems in which the parties have made an express
7 contractual choice of law." *Erwin v. Cotter Health Ctrs.*, 167 P.3d 1112, 1120-21 (Wash.
8 2007). In relevant part, § 187 requires the court to enforce the parties' contractual choice
9 of law unless "the chosen state has no substantial relationship to the parties or the
10 transaction and there is no other reasonable basis for the parties' choice," § 187(2)(a), or
11 "the application of the law of the chosen state would be contrary to a fundamental policy
12 of a state which has a materially greater interest than the chosen state in the determination
13 of the particular issue and which, under the [Restatement (Second) Conflict of Laws,
14 § 188], would be the state of the applicable law in the absence of an effective choice of
15 law by the parties," § 187(2)(b). No one argues that Washington lacks a substantial
16 relationship to Mr. Powers, Amazon, and the Agreement. For that reason, Mr. Powers'
17 plea for the application of California law requires him to, among other things, show that
18 California has a "materially greater interest" than Washington in determining the
19 enforcement of the Agreement.

20 California's interest in the enforcement of the Agreement is no greater than
21 Washington's. Washington's willingness to enforce anticompetitive restrictions reflects a
22 strong interest in protecting its businesses from unfair competition from former
23 employees. California likely has a strong interest in protecting its workers from attempts
24 by their former employers to limit their employment. Nothing, however, would permit
25 the court to conclude that California's interest is "materially greater," especially as
26 applied in this dispute. One court within this District has enforced a Washington choice-

1 of-law clause against employees *who lived and worked in California* when they signed a
2 restrictive agreement with their Washington employer. *CH2O, Inc. v. Bernier*, No. C11-
3 5153RJB, 2011 U.S. Dist. LEXIS 42025, at *2-3, *20-24 (W.D. Wash. Apr. 18, 2011).
4 In this case, Mr. Powers had no idea when he signed the Agreement that he would one
5 day seek work in California, and thus no reason to expect that California law would
6 apply. That he has now emigrated to California does not give California a materially
7 greater interest in the outcome of this dispute. In circumstances like these, the court is
8 aware of no court applying Washington's choice-of-law rules that has concluded that
9 California's interest in protecting its employees materially outweighs Washington's
10 interest in providing limited protection to its employers.

11 **D. Amazon Has Made a Sufficient Showing on the Remaining Injunctive Relief**
12 **Factors to Justify a Limited Injunction.**

13 On this record, Amazon is likely to succeed on the merits only of its claim based
14 on the Agreement's restrictions on working with former customers, although only for
15 nine months. The court now considers whether Amazon has demonstrated a likelihood of
16 irreparable harm, where the balance of hardships tilts, and the public interest.

17 Irreparable harm is a likely consequence of permitting an employee to pursue his
18 former customers in violation of a valid restriction. The monetary damage from loss of a
19 customer is difficult to quantify, and the damage to goodwill even more so. There is no
20 direct evidence that Mr. Powers intends to solicit former Amazon customers. Given his
21 opposition to Amazon's motion, however, the court finds it likely that he would approach
22 at least some customers (or some customers would approach him) if neither Google nor
23 this court prevents him from doing so.

24 In the context of this limited injunction, the balance of hardships favors Amazon.
25 Before Amazon even learned of Mr. Powers' work at Google, Google was willing to keep
26 Mr. Powers from cloud computing work until six months after he began working at
27 Google. That self-imposed restriction would have expired in late March 2013. Given

1 that Google was willing to impose that restriction and Mr. Powers was willing to accept
2 it, the court finds no hardship to Mr. Powers in enforcing the Agreement's more limited
3 customer-based restrictions until March 19, 2013, nine months after Mr. Powers' last had
4 access to Amazon information.

5 The public interest does not weigh heavily in favor of either party. There is no
6 evidence that the court's decision on this injunction will impact the public.

7 **IV. PRELIMINARY INJUNCTION**

8 For the reasons stated above, the court enters the following preliminary injunction.
9 Until March 19, 2013, unless the court orders otherwise, Defendant Daniel Powers may
10 not directly or indirectly assist in providing cloud computing services to any current,
11 former, or prospective customer of Amazon about whom he learned confidential
12 information while working at Amazon. "Confidential information" has the definition the
13 parties gave it in the Agreement.

14 Given the brief duration of the injunction, Google is unlikely to suffer significant
15 financial harm. For that reason, the court will require Amazon to obtain a \$100,000 bond
16 or deposit \$100,000 into the court's registry. *See* Fed R. Civ. P. 65(c) (requiring security
17 "in an amount that the court considers proper to pay the costs and damages sustained by
18 any part found to have been wrongfully enjoined"). This injunction will take effect upon
19 Amazon's notice of a bond or cash deposit.

20 **V. CONCLUSION**

21 For the reasons stated above, the court GRANTS in part and DENIES in part
22 Amazon's motion for a preliminary injunction. Dkt. # 11.

23 DATED this 27th day of December, 2012.

24 

25 _____
26 The Honorable Richard A. Jones
27 United States District Court Judge
28