

1 to the contrary. (Compl. ¶¶ 14–15, ECF No. 1.)

2 Plaintiff’s Complaint alleges breach of contract and states that Plaintiff will incur
3 “irreparable harm in the form of lost customer goodwill and lost business” if Defendant is
4 allowed to continue her competitive activities. (Id. ¶¶ 17–24.) Plaintiff accordingly filed an
5 Emergency Motion for Temporary Restraining Order (ECF No. 2) to prevent Defendant from
6 soliciting any of Plaintiff’s clients that she had serviced during her employ until July 23, 2015
7 (eighteen months after the date of her resignation). (Pl.’s Emergency Mot. for TRO 8:3–9, ECF
8 No. 2.) The Court denied this motion because Plaintiff failed to show that the temporary
9 restraining order should have been granted without notice to Defendant; specifically, Plaintiff
10 failed to mention the requirements of Federal Rule of Civil Procedure 65(b). (Order Denying
11 Pl.’s Mot. for TRO, ECF No. 7.) Plaintiff subsequently filed the instant Motion for Preliminary
12 Injunction (ECF No. 10).

13 **II. LEGAL STANDARD**

14 Rule 65 of the Federal Rules of Civil Procedure provides that a “court may issue a
15 preliminary injunction only on notice to the adverse party.” Fed. R. Civ. P. 65(a)(1). A Court
16 may issue a preliminary injunction only if a plaintiff establishes: (1) likelihood of success on the
17 merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance
18 of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural*
19 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “Injunctive relief [is] an extraordinary remedy
20 that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at
21 22. Finally, “[i]n deciding a motion for a preliminary injunction, the district court ‘is not bound
22 to decide doubtful and difficult questions of law or disputed questions of fact.’” *Int’l Molders’ &*
23 *Allied Workers’ Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) (quoting
24 *Dymo Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964)).

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1 **III. DISCUSSION**

2 **A. Likelihood of Success on the Merits**

3 **1. Choice of Law**

4 The Agreement contains a choice-of-law provision stating that it is governed by Missouri
5 law. (Compl. Ex. A, at 3, ECF No. 1.) Defendant argues that, despite this provision, the
6 Agreement should be governed by Nevada law. (Def.’s Resp. to Mot. for Prelim. Inj. 12:16–
7 15:26, ECF No. 19.)

8 “The first step in interpreting [a choice-of-law] clause is to apply the correct choice-of-law
9 rules.” *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996). “In
10 determining the enforceability of a choice of law provision in a diversity action, a federal court
11 applies the choice of law rules of the forum state.” *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1182
12 (9th Cir. 2009). Nevada generally follows the Restatement (Second) of Conflict of Laws in
13 answering choice-of-law questions that arise in contracts. *Progressive Gulf Ins. Co. v. Faehnrich*,
14 752 F.3d 746, 750–51 (9th Cir. 2014). “So long as ‘the parties acted in good faith and not to
15 evade the law of the real situs of the contract,’ Nevada’s choice-of-law principles permit parties
16 ‘within broad limits to choose the law that will determine the validity and effect of their
17 contract.’” *Id.* at 751 (quoting *Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortg.*
18 *Investors*, 603 P.2d 270, 273 (Nev. 1979)).

19 However, the situs specified in the contract must have “a substantial relation with the
20 transaction, and the agreement must not be contrary to the public policy of the forum.” *Sievers*,
21 603 P.2d at 273; see also *Siy v. CashCall, Inc.*, No. 2:13-cv-00953-PAL, 2014 WL 37879, at *8
22 (D. Nev. Jan. 6, 2014) (upholding California choice-of-law provision in employment contract
23 because California “meets the substantial relationship test, and . . . the agreement is not contrary
24 to the public policy of Nevada”). To determine whether a given situs satisfies the substantial
25 relationship test, Nevada considers the following factors from section 188 of the Restatement: (1)

1 the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance,
2 (4) the location of the subject matter of the contract, and (5) the parties' domicile, residence,
3 nationality, place of incorporation, and place of business. *Sotirakis v. United Serv. Auto. Ass'n*,
4 787 P.2d 788, 790 (Nev. 1990). A court applies the law of the state having the more substantial
5 relation with the transaction unless public policy concerns outweigh that relation. *Id.*

6 Here, there is no evidence that, in signing a contract governed by Missouri law, the parties
7 acted in bad faith to avoid the law of any particular state. Given that Plaintiff is incorporated
8 under the laws of Missouri with its principal place of business in Missouri, and conducts business
9 in a number of other states, it is reasonable that Plaintiff would include a Missouri choice-of-law
10 provision in the Agreement. (See Compl. ¶ 1, ECF No. 1; Def.'s Resp. 6:2–3, ECF No. 19.)
11 Further, the factors from section 188 of the Restatement do not compel a determination that
12 Nevada has a more substantial relation to this action than Missouri. These factors do not weigh
13 so heavily in favor of Nevada as to preclude the application of Missouri law. See *Sotirakis*, 787
14 P.2d at 790. Specifically, the parties negotiated and executed the Agreement in both Missouri
15 and Nevada, as Plaintiff in Missouri contacted Defendant in Nevada to recruit her away from her
16 previous employer in 1993. (See Resp. 5:27–28, ECF No. 19.) Likewise, the place of
17 performance and location of the subject matter of the contract are both Missouri and Nevada, as
18 Defendant's sales activity in her assigned region of Nevada presumably had an effect on
19 Plaintiff's business in Missouri. (See *id.* 6:1–3.)

20 Therefore, this Court will apply Missouri law to the Agreement because Nevada gives
21 parties wide latitude in choosing the law they want to apply to their contracts, Defendant assented
22 to a choice of Missouri law by signing the Agreement, and Missouri reasonably has a “substantial
23 relation with the transaction.”

24 **2. Merits**

25 The Winter test states that in order to show the necessity of injunctive relief, the plaintiff

1 must first prove a likelihood of success on the merits. 555 U.S. at 20. Here, the Court recognizes
2 that Plaintiff can show that Defendant violated the Agreement. However, Plaintiff is unlikely to
3 succeed on its breach-of-contract claim because Defendant will likely show that the Agreement is
4 overbroad and thus unenforceable as written.

5 The Agreement requires Defendant to refrain from soliciting, for eighteen months, any
6 clients that Plaintiff is doing business with at the time of her termination. (Compl. ¶ 9, ECF No.
7 1.) Plaintiff claims that Defendant violated the Agreement because she was “involved in
8 soliciting” customers whom she had serviced while employed by Plaintiff, including Aniello
9 Insurance Agency (“Aniello”) and Royle Insurance Agency (“Royle”), before July 23, 2015. (Id.
10 ¶ 11–13, 6:¶2(a).) Plaintiff supports its claim with six emails: the first five between Plaintiff’s
11 current employer, PAC, and Aniello, on which Defendant was copied, and the sixth from a Royle
12 employee to Defendant about a business transaction. (Id. at Ex. B (“Yunk Aff.”), Ex. A, B.)

13 Although Plaintiff is likely to establish that these communications constitute a breach of
14 the Agreement, Defendant is likely to succeed on her affirmative defense that the Agreement is
15 overbroad and therefore unenforceable. (See Resp. 20:5–21:12, ECF No. 19.) In Missouri,
16 “[b]ecause non-compete agreements are considered to be in restraint of trade, they are
17 presumptively void and enforceable only to the extent that they are demonstrably reasonable.”
18 *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299, 303 (Mo. Ct. App. 1980). That is, they
19 must be “no more restrictive than is necessary to protect the legitimate interests of the employer”
20 and “narrowly tailored geographically and temporally.” *Healthcare Servs. of the Ozarks, Inc. v.*
21 *Copeland*, 198 S.W.3d 604, 610 (Mo. 2006).

22 The reasonableness of the non-compete agreement’s geographical limits “depends upon
23 whether the employer possessed a stock of customers located co-extensively with those
24 geographical limits.” *Orchard*, 601 S.W.2d at 303 (reducing agreement’s geographical limit from
25 200 to 125 miles, as employer had customers only within the smaller radius); see also *Cont’l*

1 Research Corp. v. Scholz, 595 S.W.2d 396, 400 (Mo. Ct. App. 1980) (employer had no
2 protectable interests in customer contacts outside employee’s assigned territory). Missouri courts
3 have enforced customer non-solicitation clauses lacking geographical limits only “when other
4 limitations to the prohibited conduct exist or when the employee had significant contact with a
5 substantial number of the employer’s customers.” Whelan Sec. Co. v. Kennebrew, 379 S.W.3d
6 835, 842 (Mo. 2012). Similarly, in Systematic Business Services, Inc. v. Bratten, the Missouri
7 Court of Appeals enforced a national company’s non-solicitation clause prohibiting an employee
8 from contacting all of its customers, because the employee had “substantial and continuing
9 contact” with customers throughout the nation. 162 S.W.3d 41, 51 (Mo. Ct. App. 2005); see also
10 *Nat’l Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99, 104–05 (Mo. Ct. App. 1978) (enforcing
11 a customer non-solicitation clause limited to customers with whom employee and salesmen under
12 his supervision dealt).

13 Under Missouri law, the Agreement here is likely too broad to enforce as written because
14 it goes beyond simply protecting Plaintiff’s customer contacts and instead places unreasonable
15 limitations on Defendant’s ability to work in her field. The Agreement states that Defendant may
16 not

17 directly or indirectly, in any manner or capacity, engage in or have a
18 financial interest in any business carried on by the Employer during
19 the period of Employee’s employment, if such business at any time
20 contacts or solicits or attempts to contact or solicit any Customer or
Potential Customer with whom Employer is doing business at the
time of termination of Employee’s employment.

21 (Compl. Ex. A, at 2.) The Agreement defines “Potential Customer” as “a Customer which the
22 Employer actively solicits through personal contact or direct correspondence prior to or during
23 Employee’s association with the Employer.” (Id.) Because of this expansive definition and the
24 absence of geographical limitations, the Agreement effectively prevents Defendant from working
25 for any premium financing company anywhere in the world to whom Plaintiff has sent as much

1 as a letter. (See Resp. 17:22–24, ECF No. 19.) Although Defendant apparently “maintained
2 substantial customer contacts” during her employment, Plaintiff presents no evidence that
3 Defendant has had “substantial and continuing contact” with customers throughout the nation
4 like the employee in Systematic, which would necessitate a non-compete agreement without
5 geographical limits. (See Mot. for Prelim. Inj., 7:26, ECF No. 10); Systematic, 162 S.W.3d at 51.
6 Rather, Defendant appears to have had significant contact with customers only in Nevada, Utah,
7 and Arizona, and later only Nevada after Plaintiff took away her Utah and Arizona sales
8 territories. (See Resp. 25:16–19, ECF No. 19.)

9 Recognizing the overbroad nature of the Agreement, Plaintiff requests to limit the
10 application of the Agreement only to a “Restricted List” of 103 of Plaintiff’s current customers
11 that Defendant serviced during her employment. (Corrected Reply to Resp. to Mot. for TRO
12 (“Corrected Reply”) 18:9–11, ECF No. 14.) The Missouri Court of Appeals “recognize[s] that
13 an unreasonable restriction against competition in a contract may be modified and enforced to the
14 extent that it is reasonable, regardless of the covenant’s form of wording.” *Mid-States Paint &*
15 *Chem. Co. v. Herr*, 746 S.W.2d 613, 616 (Mo. Ct. App. 1988); see also *Whelan*, 379 S.W.3d at
16 847 (modifying overbroad customer/potential customer non-solicitation clauses to make non-
17 compete agreement enforceable). True enough, Plaintiff’s proposed modification seems
18 reasonable because it narrows the scope of the Agreement to customers that “represent only a
19 small fraction of the potential customers in [Defendant]’s geographic market.” (Corrected Reply
20 6:26–27). However, Plaintiff presents no case where a Missouri court has modified a non-
21 compete agreement at the preliminary injunction stage. Therefore, the Court declines to modify
22 the Agreement at this early stage of the litigation and will instead reserve judgment on the issue
23 of modifying the Agreement until after discovery and further motion practice.

24 **B. Likelihood of Irreparable Harm in the Absence of Preliminary Relief**

25 Even if the Court were to modify the Agreement at this stage of the litigation, Plaintiff is

1 still not entitled to the requested relief because Plaintiff has failed to demonstrate that it is likely
2 to suffer irreparable harm without the injunction. To succeed on the second prong of the Winter
3 test, the plaintiff must “demonstrate that irreparable injury is likely in the absence of an
4 injunction.” 555 U.S. at 22 (emphasis in original). In the Ninth Circuit, “[t]hose seeking
5 injunctive relief must proffer evidence sufficient to establish a likelihood of irreparable harm.”
6 *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013). A
7 presumption that irreparable harm is likely is not sufficient to justify the granting of a
8 preliminary injunction. See *id.* at 1242.

9 Here, Plaintiff erroneously applies the more lenient Missouri standard, which requires an
10 employer to show only that there is a threat of irreparable harm, not that actual harm has
11 occurred. *Emerson Elec. Co. v. Rogers*, 418 F.3d 841, 846 (8th Cir. 2005); see also *Osage Glass,*
12 *Inc. v. Donovan*, 693 S.W.2d 71, 75 (Mo. 1985). Plaintiff’s conclusory statements that
13 “irreparable harm is ongoing” and that Defendant is “harming and interfering with [Plaintiff]’s
14 relationships with its customers” are insufficient under the stricter Ninth Circuit standard to
15 establish—rather than presume—a likelihood of irreparable harm. (Mot. for Prelim. Inj. 5:19–25,
16 ECF No. 10.) Further, Plaintiff offers no evidence that “the hearing of the merits of this case will
17 not provide [Plaintiff] complete relief.” (*Id.* 5:21–22.) Even under the general Missouri rule that
18 injunctive relief is granted “if the remedy at law is not clear, complete and as practical and
19 efficient to the ends of justice and its prompt administration as the remedy in equity,” Plaintiff
20 has not shown that monetary damages would be unclear or inadequate here. See *Maude v. Gen.*
21 *Motors Corp.*, 626 F. Supp. 1081, 1087 (W.D. Mo. 1986) (quoting *Hughes v. Neely*, 332 S.W.2d
22 1, 7 (Mo. 1960)). Thus, Plaintiff has failed to establish that injunctive relief is necessary.

23 **IV. CONCLUSION**

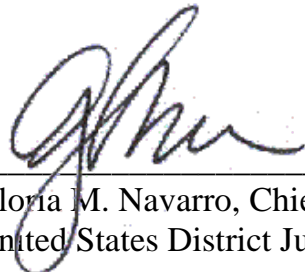
24 Because Plaintiff has not met its burden of demonstrating either a likelihood of success on
25 the merits or a likelihood of irreparable harm, the Court need not address the balance of equities

1 and public interest factors. The Court hereby denies Plaintiff's Motion for Preliminary
2 Injunction, and consequently, Plaintiff's Motion for Temporary Restraining Order is moot.

3 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Preliminary Injunction (ECF No.
4 10) is **DENIED**.

5 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Temporary Restraining Order
6 (ECF No. 9) is **DENIED** as **MOOT**.

7 **DATED** this 1st day of August, 2014.

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12 Gloria M. Navarro, Chief Judge
13 United States District Judge
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