

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**  
**CIVIL TRIAL DIVISION**

FARM JOURNAL, INC.,	:	December Term 2005
Plaintiff,	:	
v.	:	No. 2397
TRIBUNE ENTERTAINMENT	:	
COMPANY,	:	Commerce Program
Defendant.	:	
	:	Control Number 121404

**ORDER**

**AND NOW**, this 25<sup>TH</sup> day of May 2006, upon consideration of plaintiff Farm Journal's Petition for Preliminary Injunction, the responses in opposition, the evidence presented at the hearing of February 1, 2006, the respective briefs in support of proposed findings of fact and conclusions of law submitted by the parties, all matters of record, and in accord with the Findings of Fact, Conclusions of Law and Discussion of this court being filed contemporaneously, it is **ORDERED** that plaintiff's Petition for Preliminary Injunction is **Denied**.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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**FINDINGS OF FACT  
CONCLUSIONS OF LAW AND  
DISCUSSION IN SUPPORT OF ORDER  
DENYING THE PETITION FOR A PRELIMINARY INJUNCTION**

**Albert W. Sheppard, Jr., J.....May 25, 2006**

**INTRODUCTION**

In December 2005, plaintiff, Farm Journal Inc. (“Farm Journal”), filed a Petition seeking a Preliminary Injunction against defendant, Tribune Entertainment Company (“TEC”), for violating a covenant not to compete in the Asset Purchase Agreement (“Agreement”), dated April 14, 2005 between Farm Journal and TEC. In that Agreement TEC expressly covenanted that neither it, nor any of its Affiliates, would engage in programming “substantially similar” to U.S. Farm Report for a period of three –and-a-half years from the date of the sale. According to Farm Journal, in late November 2005, two of TEC’s alleged Affiliates, Orion Samuelson and Max Armstrong, launched a nationally televised agricultural news program called “This Week in AgriBusiness”, which is “substantially similar” to U.S Farm Report.

The accompanying Complaint alleges breach of contract and breach of warranty, and seeks specific performance and a declaratory judgment. An evidentiary hearing was conducted on February 1, 2006.

The court denies the Petition and in support of this decision files the following Findings of Fact, Discussion and Conclusions of Law.

## **FINDINGS OF FACT**

### **BACKGROUND**

1. Farm Journal, founded in 1877, is a Pennsylvania corporation based in Philadelphia. It is a multi media company devoted to improving the livelihood of farmers. (N.T. 31). It employs approximately 150 people including 25 people devoted solely to its television business. (Id. at 32, 77).
2. Andrew J. Weber is the CEO of Farm Journal. (N.T. p. 28).
3. Tribune Entertainment Company (“TEC”) is a Delaware Corporation headquartered in Chicago, Illinois. It is the wholly owned television production company and syndication of Tribune Company. (Plts. Exh. 4).
4. Richard H. Askin is the president and CEO of TEC. (N.T. p. 132).
5. WGN (AM 720) (“WGN Radio”) is situated in Chicago and is the leading broadcaster of agribusiness news in the Midwest, with a signal that covers much of Indiana, Illinois, Wisconsin and parts of Iowa and Michigan. (Complaint ¶ 9).
6. Thomas E. Langmyer is the Vice President and General Manager of WGN (AM 720). (N.T. p. 171).

7. Tribune Company and Tribune Broadcasting are the parents of TEC and WGN Radio. WGN Radio is a wholly owned subsidiary of Tribune Broadcasting and a sister company of TEC. (N.T. p. 136, 181).
8. Orion Samuelson (“Samuelson”) and Max Armstrong (“Armstrong”) are employees of WGN Radio. (N. T. 182).
9. Samuelson and Armstrong regularly broadcast agricultural news and information on WGN Radio and the Tribune Radio Network. Their broadcasting includes 16 hourly agricultural market updates each business day (N.T. p. 225); a one hour agribusiness radio program aired twice every Saturday (Plts. Exh. 5); two Tribune Radio Network programs broadcast by 165 radio stations nationwide called “Farming America” and “National Farm Report”, (Plts. Exh. 23); and a weekly agricultural commentary by Samuelson called Samuelson Sez., (Plts. Exh. 22). Samuelson is also WGN Radio’s Director of Agricultural Programming (N.T. 250).
10. Prior to April 14, 2005, TEC aired a television program entitled U. S. Farm Report. U. S. Farm Report was hosted by Samuelson and Armstrong. (N.T. p. 40). U.S. Farm Report is not part of WGN Radio. (N. T. p. 173).
11. Samuelson and Armstrong were not TEC employees. (N.T. p. 89, 98,136, 137, 213-214).
12. HYP is an independent company which contracted with TEC to produce U. S. Farm Report. Samuelson and Armstrong are independent contractors for HYP. (N.T. p. 98). Under the terms of the HYP contract with TEC, HYP contracted out the services

of Samuelson and Armstrong. Samuelson and Armstrong's services were exclusive to U. S. Farm Report in the fields of network and syndicated television. (Id.).<sup>1</sup>

13. The standard in the broadcasting industry permitted broadcasters to work on multiple communication platforms. (N.T. p. 173).

14. WGN Radio accepted this standard and permitted its broadcasters to host shows on television. (N.T. p. 173-174). Samuelson and Armstrong understood that they were permitted to work in television. (N.T. p. 234).

### **SALE OF U. S. FARM REPORT**

15. On April 14, 2005, after one year of negotiations, Farm Journal purchased U.S. Farm Report from TEC for 2.6 million dollars. (Plts. Exh. 6).

16. The sale included tangible property, such as sets and props, extensive U.S. Farm Journal video tape libraries and all "b-roll" associated with the program. It also included intellectual property rights, contractual assignments, distribution rights, advertising and other important assets. Id.

17. The sale transferred the U. S. Farm Report Brand, copyrights, trade name and other intellectual property. (Plts. Exh. 6; N.T. p. 82, 145-46).

18. As part of the sale, TEC agreed to continue to distribute U. S. Farm Report for three years following the sale to Farm Journal and agreed to use reasonable good faith efforts to supplement its distribution services by arranging for the airing of television

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<sup>1</sup> Under the terms of Samuelson and Armstrong's contract with HYP, an exclusivity provision existed which granted Samuelson and Armstrong permission to appear in programming telecast exclusively by RFD-TV. (Dft. Exh. 6).

episodes over regional or national cable networks or systems and satellite channels.

(N.T. p. 145)

19. The sale also assigned certain TEC contracts to Farm Journal including but not limited to the Production Services Agreement with HYP and its advertising commitments relating to the Program. (Plts. Exh. 6).

20. The Agreement also contained a non-compete provision, which provides:

Neither TEC nor any Affiliates of TEC shall engage in any television business the same as or substantially similar to the production of U.S. Farm Report or the exploitation of U.S. Farm Report as it is now being conducted by TEC.

(Plts. Exh. 6- ¶ 5.01 (a)).

21. Affiliate was defined in the Agreement to mean, “with respect to any specified Person, any other Person directly or indirectly controlling, or controlled by, or under direct or indirect common control with, such specified Person.” (Id. ¶ 3.07 (c)). The term person was defined to include both “individuals” and “other entities”. Id.

22. WGN Radio was not aware of the transaction between TEC and Farm Journal before it closed. (N. T. p. 141-142, 172).

23. Langmyer was not aware that the Agreement between TEC and Farm Journal contained a non-compete provision. (N.T. p. 141-142, 172).

24. Farm Journal never asked Samuelson and Armstrong to sign a non-compete agreement. (N.T. p. 137-138).

25. After the closing, U.S. Farm Journal continued airing pursuant to the arrangements set up by TEC with Samuelson and Armstrong as hosts. (Dft. Exh. 2).

26. Additionally, Samuelson and Armstrong continued working for WGN Radio. (N.T. p. 140-141).

### **FARM JOURNAL TERMINATES CONTRACT WITH HYP**

27. On July 8, 2005, Farm Journal terminated the contract with HYP to produce U.S. Farm Report. (N.T. p. 50).

28. Farm Journal's termination of the contract with HYP also terminated Samuelson and Armstrong's exclusive services to U.S. Farm Report. (Plts. Exh. 21; Dft. Exh. 6).

29. Thereafter, Farm Journal attempted to enter into new contracts with Samuelson and Armstrong to keep them with the program. (N.T. p. 51-54).

30. Farm Journal spoke to Samuelson and Armstrong about the prospect of their continuing on as hosts of U.S. Farm Report after Farm Journal terminated the HYP contract. Samuelson had several prerequisites including the continued taping of the show in Chicago. Farm Journal refused to continue taping U. S. Farm Report in Chicago. (Plts. Exh. 21; N.T. p. 53-57).

31. Samuelson and Armstrong elected to part ways with U. S. Farm Report because they did not wish to commute to South Bend, Indiana, where Farm Journal's production facility was located. (Plts. Exh. 21; N.T. p. 56).

32. Samuelson and Armstrong hosted their last episode of U.S. Farm Report on August 6, 2005. (N.T. p. 58).

33. In the second week of August 2005, Farm Journal began airing U.S. Farm Report with a new host. (N.T. p. 57).

### **THIS WEEK IN AGRIBUSINESS**

34. Following Samuelson and Armstrong's departure from U.S. Farm Report, Samuelson and Armstrong began to pursue discussions and entered into financial and contractual commitments to produce a new TV show entitled "This Week in AgriBusiness." (N.T. p. 227-234).

35. On October 14, 2005, Samuelson and Armstrong created OMAX, a limited liability company to produce television programs for the farming communities. The shares were owned equally by Samuelson and Armstrong. (N.T. p 226-227). Samuelson invested \$100,000.00 in OMAX as start up money.<sup>2</sup> Id. Armstrong invested \$30,000.00 in OMAX. Id.

36. OMAX entered into various relationships in order to produce the "This Week in AgriBusiness" TV show. OMAX hired Phil Reid, Angelo Lazzarae and Ryan Ruh on a free lance basis to produce the show. OMAX entered into a contract with Mindsight, a production studio to use its studio, cameras and staff. OMAX also entered into a contract with RFD-TV, a satellite dish channel, to carry the program. (N.T. 228-229). RDF-TV is not related to TEC. (N.T. p. 79).

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<sup>2</sup> Samuelson took out a home equity loan to invest in OMAX. (N.T. p. 226-227).

37. OMAX also hired a meteorologist. (N.T. p. 242).
38. Archer Daniels Midland, a large agribusiness company that advertised on U. S. Farm Journal, contacted Samuelson and Armstrong and committed to advertising on “This Week in AgriBusiness” until June 30, 2006. (N.T. p. 230). Samuelson and Armstrong did not contact Archer Daniels Midland. Id.
39. Shortly after Samuelson and Armstrong’s departure, the Wall Street Journal published an article reporting that two “nationally renowned” agricultural broadcasters, which Farm Journal believed to be Samuelson and Armstrong would be starting an agribusiness news program on the satellite channel RFD-TV, a satellite station unrelated to any Tribune companies. (N.T. p. 61).
40. On September 28, 2005, Farm Journal informed TEC about Samuelson and Armstrong’s intention to launch a competing show. (Plts. Exh. 8; N.T. p. 62-64).
41. On October 4, 2005, Andrew Weber, Farm Journal’s CEO called Richard Askin, TEC’s CEO and informed him that Farm Journal would view the launch of a competing show by Samuelson and Armstrong as a violation of TEC’s obligations under the Agreement, in which it agreed that none of its Affiliates would compete against U.S. Farm Report. (N.T. p. 63).
42. On October 28, 2005, Samuelson and Armstrong issued a press release formally announcing the launch of “This Week in AgriBusiness”, the first episode of which would air on November 19, 2005. (Plts. Exh. 8; N.T. p. 65).

43. On October 31, 2005, the President of Farm Journal, Jeff Pense e-mailed David Berson, TEC's General Counsel voicing his concerns that the launch of the new program by Samuelson and Armstrong constituted a direct threat to the value of its asset. (Plts. Exh. 8).
44. On November 19, 2005, the first episode of "This Week in AgriBusiness" aired on RFD-TV. (N.T. 158).
45. After the program aired, Samuelson and Armstrong learned for the first time that a non-compete clause existed in the Agreement between TEC and Farm Journal. (N.T. p. 215).
46. Neither TEC nor WGN Radio had, or have anything to do with "This Week in AgriBusiness", nor did either entity encourage Samuelson and Armstrong to produce the show. (N.T. p. 146-147, 175-176).
47. WGN Radio receives no benefit from "This Week in AgriBusiness." (N.T. p. 206, 235, 208-209, 278, 175).

## DISCUSSION

### A. Standard of Review for Preliminary Injunction.

In considering whether to grant a preliminary injunction, this court may rely on the averments of the pleadings and petition, affidavits of the parties, or any other proof that the court may require. Pa. R. Civ. P. 1531. A preliminary injunction is a extraordinary form of relief granted only in the most compelling cases. United Products Corp. v. Transtech Mfg. Inc., 2000 Phila. Ct. Com. Pl. LEXIS 91 (2000)(quoting Goodies

Olde Fashion Fudge Co. v. Kuiros, 408 Pa. Super. 495, 597 A.2d 141, 144 (1991)). The purpose of the preliminary injunction is to preserve the status quo as it exists or previously existed before the acts complained of, thus preventing irreparable injury or gross injustice. Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277, 1286 (1992).

The court may grant the injunction only if the moving party establishes the following elements:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages,
- (2) greater injury will occur from refusing the injunction than from granting it,
- (3) the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct,
- (4) the wrong is actionable and the plaintiff's right to relief is clear, and
- (5) the injunction is reasonably suited to abate that wrong.

School Dist. v. Wilkinsburg Educ. Ass'n, 667 A.2d 5,6 n.2 (Pa. 1995). These requisite elements "are cumulative, and if one element is lacking, relief may not be granted." Id. Before a court may issue a preliminary injunction, it is essential that the conduct sought to be restrained is actionable. Milicic v. Basketball Mktg. Co., 857 A.2d 689 (Pa. Super. 2004) (*citing* Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1283 (Pa. Super. 1992)).

Here, the relief sought by Farm Journal is in the nature of a mandatory injunction, (that is, seeks to compel TEC to prohibit Samuelson and Armstrong from continuing their TV show). Courts will grant a mandatory injunction only upon a very strong showing that the plaintiff's right to relief is clear because such an injunction compels the defendant to perform an act, rather than merely restraining the defendant from acting. Sovereign Bank v. Harper, 674 A.2d 1085, 1092 (Pa. Super. 1996).

The court concludes that plaintiff has not established the requisite elements for an injunction.

**B. Samuelson and Armstrong are not Affiliates of TEC when hosting and producing “This Week in AgriBusiness”.**

The threshold issue is whether the covenant not to compete in the Agreement between TEC and Farm Journal embraces Samuelson and Armstrong’s program entitled, “This Week in AgriBusiness”. Farm Journal maintains that the covenant not to compete includes Samuelson and Armstrong because they are Affiliates of TEC since they are employees of WGN Radio and consequently are under the “common control” of TEC. (Farm Journal Brief p. 12). Farm Journal further argues that as long as Samuelson and Armstrong remain WGN Radio employees, they remain TEC Affiliates and do not lose their status by engaging in outside work. *Id.* This court cannot agree.

The pertinent language of the covenant not to compete states

“...neither Tribune nor any Affiliate of Tribune shall engage in any television business the same as or substantially similar to the production of the Program...as is now being conducted by the Tribune”.

(5.01 Agreement of Sale).

In the Agreement, “Affiliate” is defined as

“...with respect to any specified Person, any other Person directly or indirectly controlling, or controlled by or under direct or indirect common control with such specified Person.”

(3.07 Agreement of Sale).<sup>3</sup>

The Agreement further defines “control” including its correlative meanings, “controlling”, “controlled” and “under common control with” of any Person to mean

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<sup>3</sup> TEC argues that this provision is ambiguous. The court disagrees.

“the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise.”

(Id.).

The term “Person” is defined as

any individual, corporation, partnership, joint venture, association, joint stock company, limited liability company, trust, unincorporated organization or government or any agency or political subdivision thereof or other entity.

(Id.).

Application of these definitions here, leads to the conclusion that Samuelson and Armstrong are only Affiliates for purposes of the covenant not to compete when they are performing their radio duties, that is, when they are under the common control of WGN Radio, TEC’s sister company. However when Samuelson and Armstrong are performing television and other non-radio duties for a non-related entity (RFD-TV) they are not Affiliates for purposes of the covenant not to compete. In this setting they are not under the “common control” of WGN Radio or TEC.

The crux of the issue rests upon the scope of the legal relationship between Samuelson and Armstrong on the one hand and TEC on the other and whether TEC, through its sister station WGN Radio, has the ability to control Samuelson and Armstrong in their pursuit of their private business venture, “This Week in AgiBusiness”. The Restatement (Second) of Agency § 228 defines conduct within the scope of employment as follows:

- (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master.

- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Butler v. Flo-Ron Vending Co., 557 A.2d 730 (Pa. Super. 1989) (*quoting* Restatement (Second) of Agency § 228).

Here, the record evidence demonstrates that WGN Radio does not employ Samuelson and Armstrong to report agricultural news through television broadcasts. “This Week in AgriBusiness” is produced by OMAX, a limited liability company owned and operated by Samuelson and Armstrong, for **television**. OMAX uses Mindsight studios for their production and the show is distributed by RFD-TV. “This Week in AgriBusiness” is separate and distinct from WGN Radio and there is no connection to TEC or any other of its corporate affiliates.

Additionally, there is no evidence to suggest that TEC or WGN Radio facilitated the institution of the “This Week in AgriBusiness” television show. At the time the first episode of “This Week in AgriBusiness” aired neither TEC nor WGN Radio had anything to do with producing the show. (N.T. p. 146-147, 176, 208-209, 235, 278). “This Week in AgriBusiness” does not air on any Tribune stations and Samuelson and Armstrong do not mention their show while on air at WGN Radio. (N.T. 235). Moreover, WGN Radio receives no benefit from “This Week in AgriBusiness”. There is no cross promotion (N.T. p. 206, 235) and WGN Radio does not receive any money or revenue from “This Week in AgriBusiness” (N.T. p. 175, 176, 235). Based on the foregoing, Samuelson and Armstrong’s hosting, producing and broadcasting “This Week in AgriBusiness” is outside the scope of their employment with WGN Radio.

This conclusion is consistent with the longstanding custom in the broadcasting industry of permitting broadcasters to engage in multiple communication platforms. Langmyer, the vice president and general manager of WGN Radio, testified that Samuelson and Armstrong would be free to work for a television station since radio and TV do not compete.<sup>4</sup> (N.T. p. 173).

Indeed, Samuelson and Armstrong have a long history of working in other media communications to supplement their WGN Radio salaries. For instance, Samuelson and Armstrong hosted U.S. Farm Report not only while it was owned by TEC but also for several months following the sale to Farm Journal. Samuelson is sought as a speaker, writes a column for newspapers in the Central Midwest, consults with people in communications, and serves on several boards. All of these activities are outside his radio broadcasting role at WGN Radio and he is not compensated by WGN Radio for them. (N.T. p. 212-213). This custom and practice demonstrates a separation of the communication industries of radio and television.

Since Samuelson and Armstrong's broadcasting "This Week in AgriBusiness" is outside the scope of their employment with WGN Radio, TEC lacks the "common control" necessary to direct or cause the direction of "This Week in AgriBusiness".<sup>5</sup> "This Week in AgriBusiness" is independent from WGN Radio. Consequently, when Samuelson and Armstrong host and broadcast "This Week in AgriBusiness", they are not under the common control of TEC or WGN Radio and,

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<sup>4</sup> Langmyer also testified that other radio broadcasters employed by WGN Radio worked at television stations such as Fox and NBC Universal WMEQ-TV in Chicago and that WGN Radio does not complain or attempt to stop such activity. (N.T. p. 174).

<sup>5</sup> A company exercises control of employees if it has the power to hire or fire them or otherwise set conditions on their employment. *See Internat'l Assoc. of Firefighters v. Commw.*, 504 A.2d 422 (Pa. Commw. 1986). Absent from the record is any evidence that TEC or WGN Radio maintains common control over "This Week in AgriBusiness", such as the power to hire, fire, contract or edit.

therefore, are not Affiliates for purposes of the covenant not to compete.<sup>6</sup> Thus, TEC cannot be held accountable for Samuelson and Armstrong hosting and producing “This Week in AgriBusiness”, and as a consequence, has not violated the covenant not to compete.

Parenthetically, the court suggests that it would be unreasonable and contrary to public policy to find that the covenant not to compete extends to Samuelson and Armstrong’s outside work. Restrictive covenants are not favored in Pennsylvania and have been historically viewed as trade restraints that can prevent employees from earning a living. *See Jacobson & Co. v. Int’l Env’t Corp.*, 235 A.2d 612 (Pa. 1967). The court recognizes that a covenant not to compete which is ancillary to a contract for the sale of a business is subject to a less rigorous reasonableness examination than that ancillary to an employment contract. *See Scobell, Inc. v. Schade*, 688 A.2d 715, 718 (Pa. Super. 1997). However, finding that TEC violated the covenant not to compete when Samuelson and Armstrong entered into a private business venture outside the scope of their employment and outside TEC’s common control would place an unreasonable restriction upon Samuelson and Armstrong’s freedom with no resulting benefit. It would also place an unreasonable burden upon TEC to monitor the outside activities of its employees. Absent an explicit provision, the court is reluctant to find a violation of the covenant not to compete. Any other interpretation would bargain away the private rights of Samuelson and Armstrong to perform any work outside the scope of their employment with WGN

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<sup>6</sup> Farm Journal notes and relies upon WGN Radio’s payment of travel expenses for industry conferences during which Samuelson and Armstrong allegedly gathered substantial content for their television show, at WGN Radio’s expense, and print advertisements consisting of websites and press releases which advertise Samuelson and Armstrong affiliation with WGN Radio and RFD TV, as evidence of common control. This evidence is inconclusive since it fails to demonstrate TEC’s ability to direct or cause direction of OMAX or “This Week in Agribusiness”. Any benefit Samuelson and Armstrong receive from these institutions are merely collateral to their employment with WGN Radio.

Radio, notwithstanding the acknowledged custom in the industry that performers typically work in both mediums.

Further in this regard, the court finds that greater injury will occur if this injunction were granted. If Samuelson and Armstrong were forced to stop broadcasting “This Week in AgriBusiness”, they would suffer significant economic harm. OMAX entered into contracts with Mindsight and RFD-TV, respectively, to produce and broadcast the show. Further, OMAX employs three individuals to assist in the production of the show. If the show were cancelled, OMAX would remain obligated for the term of the contracts,<sup>7</sup> and the three production individuals would be terminated. Moreover, Samuelson would remain obligated to satisfy the \$100,000 home equity loan he borrowed for start up money for OMAX. In summary, the court believes that greater harm would result if the injunction were granted.

Accordingly, the Motion for Injunctive Relief should be denied.

#### **CONCLUSIONS OF LAW**

1. Farm Journal has not demonstrated that it has a clear right to relief.
2. WGN Radio does not have common control over Samuelson and Armstrong’s producing, hosting and broadcasting, “This Week in AgriBusiness” on a non-related television station.
3. Samuelson and Armstrong’s work in “This Week in AgriBusiness” is outside the scope of their employment with WGN Radio.
4. Samuelson and Armstrong are not Affiliates of TEC for purposes of the covenant not to compete when broadcasting “This Week in Agribusiness”.

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<sup>7</sup> The obligation to Mindsight is \$6,800. per month and the obligation to RFD-TV IS \$2,500. per week. (N.T. p. 229).

5. TEC has not violated the covenant not to compete and the Motion for Injunctive Relief should be denied.

The court will enter a contemporaneous Order consistent with these Findings,  
Conclusion and Discussion.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**