No. _____

In The
Supreme Court of the United States

DEBE OLSON,

Petitioner,

v.

FARMERS NEW WORLD LIFE INSURANCE COMPANY; FARMERS INSURANCE GROUP, ALSO KNOWN AS FARMERS GROUP, INCORPORATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID SHELLER
State Bar No. 18193700
Fed. Bar No. 85884
david@shellerlawfirm.com
SHELLER LAW FIRM, PLLC
360 FM 1959
Houston, Texas 77034
Telephone: 832-841-1175
Attorney for Petitioner Debe Olson

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

One: Whether the trial court improperly granted a Motion to Dismiss the putative class because there was no notice to the putative class and therefore no right to be heard violating the putative class's rights to due process and notice under the 14th Amendment and Rule 23(e) FRCP?

Two: Whether equitable tolling applies and this case should be differentiated from *Resh v. China Agritech* because there was no notice to the Farmers class, and Farmers' taking of the policyholders' money was done secretly, which differentiates it from *Resh* where there were repeated notices to sophisticated investors regarding their rights?

Three: The Supreme Court needs to rule that a lack of notice to the class of unlitigated undisclosed deceptive acts and the loss of class action status for other reasons gives the Defendants unequal protection under the 14th Amendment and is distinguishable from *China Agritech v. Resh*.

PARTIES TO THE PROCEEDING

Petitioner Debe Olson was the plaintiff and putative class representative in the district court proceedings and appellant in the court of appeals proceedings. Respondents are Farmers New World Life Insurance Company and Farmers Group, Inc.

RELATED CASES

Fairbanks v. Farmers, 197 Cal. App. 4th 544 (2011), Cal. Court of Appeal Second District, Division One, July 13, 2011

Fairbanks v. Farmers, Cal. 2nd Appellate Division, Division One (unpublished opinion December 7, 2016)[1]

[1] Neither case decision pertains to the secret taking and use of existing policyholders' money by the Farmers Defendants to lure new policyholders by quoting higher interest rates.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Debe Olson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is not reported, but is reproduced at App. 1-2. The Fifth Circuit's Denial of Petitioners Petition for Rehearing *En Banc* is reproduced at App. 13-14. The opinions of the District Court for the Southern District of Texas are reproduced at App. 3-4 and 5-12.

JURISDICTION

The Court of Appeals entered judgment on August 7, 2019. The court denied a timely petition for rehearing *en banc* on October 15, 2019. Petitioner filed her Motion for Extension of Time to File the Petition for Writ of Certiorari on January 9, 2020. The Clerk of Court called Petitioner's Counsel and the Petitioner immediately sent the court 4 hard copies as requested by the Clerk's office. This was done as soon as the Clerk called our office.

Per the Clerk's office the hard copies were received on March 24, 2020. The letter from the Clerk's Office gave the Petitioner 150 days to file her Petition for Writ of Certiorari. The time expired on March 24, 2020.

Thus the Petitioner had no time to file her Petition. In fact the letter and Order from the Clerk's office were not received until early August 2020 as set out in our Motion. Petitioner's Counsel left the state on March 26, 2020 due to the coronavirus outbreak, and has not returned to Houston as of August 14, 2020. Everyone in Petitioner's Office has been working remotely since that time due to coronavirus and their ages. Dale Moon, who is President of the Company located next door states the Clerk's letter was not received from March 24 through August 1, 2020.

This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the 14th Amendment to the United States Constitution and Rule 23(e) FRCP.

INTRODUCTION AND STATEMENT OF THE CASE

The Fifth Circuit opinion conflicts with Supreme Court decisions in *Mullane v. Hanover Bank*, 339 U.S. 306 (1950) which holds at page 314: An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457 (1940); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Priest v. Las Vegas*, 232 U.S. 604 (1914); *Roller v. Holly*, 176 U.S. 398 (1900). The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra*, and *cf. Goodrich v. Ferris*, 214 U.S. 71 (1909). But when notice is a person's due, process which is a mere gesture is not due process. *Id* at 315.

That is not what happened in this case. The current *Olson* decision fails to consider due process and notice which are the actual issues in the case. The lack of notice then implicates the discovery rule under California law. The District Court found that the discovery rule does not apply to tolling, but cites no authority for its position. The current Fifth Circuit *Olson* decision effectively conflicts with the holdings of the 10th Circuit, 7th Circuit, 2nd Circuit, and the 9th Circuit regarding notice to a denied class regarding prejudice as well as the Manual for Complex Litigation Fourth Section 21.313, and Wright and Miller's Federal Practice and Procedure, Civil Sec. 1793. See *Johnson v. Meritor Health Services Employee Retirement Plan*, 702 F.3d 364 (7th Cir. 2012), which holds at page 371:

> But given the potential harm to individual class members if the monetary relief to which each is entitled is determined by averaging rather than by individual determination,

> **either the class members should be notified of the class action and allowed to opt out and notice and opt out, we just said, are permitted in a (b)(2) class action even though not required**.

Other cases with similar holdings are: *Folks v. State Farm*, 784 F.3d 730 (10th Cir. 2015), and *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401 (9th Cir. 1989).

Class Certification is sought on the issue of Farmers secret interest taking from existing policyholders to increase the interest rate paid to new policyholders. The 5th Circuit's *Olson* Opinion really means that Ms. Olson, on an individual basis, who had obtained a 2017 inforce illustration that showed her premiums would not increase at all, and the 903,000 other class members, **who did not receive notice and had no reason to look for a class action,** should have known about the class action in California. ROA 1360-64. Therefore, Ms. Olson and the putative class should have filed suit within 2 years of the first denial of class certification.[2] The 5th Circuit Opinion, without analysis, agrees with the District Court and holds that the

---

[2] In *Fairbanks v. Farmers New World Life Insurance Co.*, 1987 Cal. App. 4th 544, 547, 560 (2011) the underfunding cause of action was probably denied because Fairbanks Class Counsel failed to file a very important trial brief with the Court of Appeals. *Fairbanks, supra* fn 19. Underfunding is not a part of the *Olson* Motion for Class Certification. In the 2nd California hearing, all claims except underfunding were dropped without any notice to the class as shown by the transcript from that hearing. ROA 1129-1136.

discovery rule does not apply since the class members should have known about the class denial. The effect is that the putative class members, individually and as a class, who are unaware that a class action has been lost or that they have been cheated will lose their cases based on the Statute of Limitations. The same ruling will apply to other unsuspecting consumers in any class action that is lost.

"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The case of *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) states: **The core of these requirements is notice and a hearing before an impartial tribunal.**

Farmers argument will cite the unpublished appendix of the case of *Katrina v. Canal Breaches Litig. v. State Farm Fire and Cas. Co.*, 401 Fed. App'x 884, 886 (5th Cir. 2010) in support of its claim that no notice is necessary. This holding conflicts with the earlier holding of the 5th Circuit in *In Re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007).

The *Olson* decision is analogous to the dissent in the original decision of *Torres SGE Mgmnt. LLC*, 805 F.3d 145 (5th Cir. 2015) by Judge Wiener which stated:

> I am compelled to respectfully dissent today by the realization that the panel majority's opinion will vaccinate illegal pyramid schemes against all civil litigation, immunizing them not just from class actions but

> ultimately from all judicial challenges. By erecting this barrier to class certification based on nothing more than the theoretical possibility of prior knowledge of illegality, the panel majority creates an insurmountable barrier in this circuit to future class certification of cases that claim the presence of an illegal pyramid scheme.

The District Court and 5th Circuit Decisions also create an insurmountable barrier for class members who will lose their day in court and rights to due process without any notice to them.

REASONS FOR GRANTING THE PETITION

THE JUSTNESS AND VALIDITY OF MS. OLSON'S CLAIMS AS WELL AS THE CLASS CLAIMS REQUIRE NOTICE

The 5th Circuit panel had to ignore the affidavit of Debe Olson that she did not know of the deceptions. ROA 1356-1358. The 5th Circuit panel also had to completely discount the secret interest taking from existing policyholders which was done to induce new policyholders to buy the policy. ROA 1260-1261. The panel also had to ignore the 2017 Farmers current illustrations on Olson's $50,000 FUL policy. The illustration showed it was only necessary for her to pay $856 from age 61 to age 100. The illustration did not show what would really happen, which was an increase in premiums to $285,000 from ages 80 to 100. The

premium increase is proven by the unrebutted testimony Actuary, V.P. Gallagher. ROA 1359-1365, 1366-71.

A. FARMERS SCHEMES TO DECEIVE POLICYHOLDERS

In or about February 1993, the secret Farmers Interest Committee had its quarterly meeting to decide how to sell more universal life policies to unsuspecting new policyholders. ROA 1260-1262.[3] Farmers knew quoting a high interest rate on its universal life policies was the most important factor to lure new policyholders into buying its universal life insurance products. ROA 1261. Farmers had to figure out a scheme to do so without it costing Farmers any money out of Farmers own pocket and Farmers did. Deborah Senn, the former Washington State Insurance Commissioner for 8 years, testified this was a deceptive practice. ROA 1336-1355.

The conversation in the secret interest committee went something like this.

---

[3] The Defendants will claim this cause of action has been decided before and spent the first 1000 plus pages of the ROA doing so, but that is a false statement. This particular cause of action was never heard and decided by the courts per the court of appeals opinion, *Fairbanks v. Farmers New World Life Insurance Co.*, 197 Cal. App. 4th 544, 547, 560 (2011). On the 2nd Motion, all causes of action except underfunding were dropped at the start of the Certification Hearing without any notice to anyone as shown by the transcript from that hearing. ROA 1129-1136.

We need to quote a high interest rate to get new policyholders to buy our policies and keep pace with our competitors. Interest rates are declining. ROA 1260-1261.

We are discontinuing our Farmers Universal Life Policies "FUL" as of 1993. They are no longer the driving force of our business. ROA 1261. Let's take interest from those high interest earning FUL policies, and use that interest to gain early sales momentum to quote a competitive interest rate to lure people to buy new Farmers Flexible Universal Life Policies "FFUL". ROA 1260-1261.

Every quarter for 3 years Farmers secret interest committee met and voted to keep the scam going until March of 1996. ROA 1259-1293. In February of 1996, after selling approximately 215,000 new FFUL policies, Farmers changed course. ROA 1284, 1345, 1360-1361.

The conversation changed according to the notes of the secret interest committee meetings of February 22, 1996 to:

Points of interest during the committee deliberations include:

• Concern was expressed over the fairness of our practice of keeping buckets open longer during declining rate environments. While this practice enables FNWL to credit competitive new money rates, existing policyholders receive lower crediting rates as they are subsidizing the

interest spreads, to some extent, for the new money. ROA 1284.

Of course, Farmers never told its policyholders or agents of its secret machinations to take interest from existing policyholders and use it to lure new policyholders into the fold. Everything was done in secret per David Demmon, head of the Interest Committee from 1993-1996. ROA 1294, 1300 l. 10-16, 1301 l. 5-21. The documents are all marked confidential pursuant to confidentiality order.

Debe Olson, and the entire putative class who either owned an FUL and or bought an FFUL policy between March 1993 and March 1996, were completely unaware of these machinations. They were all deceived by Farmers nefarious scheme which was a material fact that any reasonable existing policyholder or purchaser would have wanted to be aware of to either keep or buy a policy. ROA 1356-1358.

B. FARMERS SCHEME TO TRANSFER THE INVESTMENT RISK TO THE CLASS

As admitted by Farmers own expert Prof. Harold Skipper, universal life policies transferred the investment risk to the policyholders. Prof. Skipper testified as follows at ROA 1256:

FARMERS WITNESS – What I meant in my answer was that we saw much more variable life being sold beginning in the '80s, and variable life

is – by definition transfers some, if not all, of the investment risk to the customer.

This would include universal life such as the FUL and FFUL policies made the subject of this class action and appeal. ROA 1257.

Prof. Skipper, Farmers Expert, further admitted that people could not read and understand their policies and that is the reason why there is a need for insurance laws and regulations. ROA 1254-1255. A survey showed that less than half felt they could read and understand their policies. ROA 1255. VP Gallagher, a Ph.D. Actuary, testified that he found the FUL policy unintelligible. ROA 1548.

There is no way the Plaintiff or the class could have known of the transfer of the investment risk to them. Farmers gave them no written warnings of the reality of the situation and the dangers to them. There was never any notice to the policyholders of these dangers.

The District Court and the 5th Circuit also bought Farmers argument that the fraud was not of a continuing nature. That argument is completely untrue. The interest taken from Ms. Olson and the class would have continued to compound over the last 25 years, giving her and the class more cash value in their policies. This concept is true no matter how long someone held their policies. In fact, it is the way life insurance policies work by the compounding of interest and principal, which is the reason why buying a policy at a much younger age should result in lower premiums on a

lifetime basis. Ms. Olson's Farmers policy stated it was permanent insurance on the policy. In actuality, it was annual renewable term insurance which is why the premiums skyrocketed and the effect causes most people to lose the insurance they have paid for all their lives in their 80's when they really need the coverage.

That is what makes notice so important in this case. The case of *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990) fn 71 also recommends notice as does *In Re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007). *Folks v. State Farm*, 784 F.3d 730 (10th Cir. 2015) held at page 739: that a class member has the rights to notice of the progress of the case citing notice and may also keep class members apprised of a lawsuit as it progresses. *See* Fed.R.Civ.P. 23(c)(2), (d)(l)(B), (e)(l), & (h)(I); *See* also William B. Rubenstein, *Newberg on Class Actions* § 8:1 (5th ed.2011) (describing four types of notice in class action litigation). Judge Posner also writes that notice may be appropriate in some instances in *Johnson v. Meritor Health Services Employee Retirement Plan*, 702 F.3d 364, 370 (7th Cir. 2012). *See* also *In Re Zyprexa Products Liability Litigation*, 620 F.3d 121 (2d Cir. 2010), *cert. denied*, 131 S.Ct. 3062, 180 L. Ed. 2d 903 (2011).

Without notice to the class, Farmers will take money from the policyholders' savings in the policy to pay the premiums and probably deplete all of their savings so they will lose their policy and their alleged savings. *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408-11 (9th Cir. 1989) held that in deciding

whether the putative class should receive notice of voluntary dismissal of putative class claims, courts:

> should inquire into possible prejudice from (I) class members' possible reliance on the filing of the action if they are likely to know of it either because of publicity or other circumstances, (2) lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations . . .

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Many circuits continue to be concerned with the need for notice. In *Vargas v. Central Freight Lines, Inc.*, Case No. 16-cv-00507 (9th Cir. 2017), the court held:

With respect to putative class actions, in 1989, the Ninth Circuit held class notice may be required under Federal Rule of Civil Procedure 23(e) prior to voluntary dismissal of putative class claims even in cases where no class has been certified. *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408-11 (9th Cir. 1989). District courts in the Ninth Circuit "continue to follow *Diaz* to evaluate a proposed settlement and dismissal of putative class claims." *Id.*; *Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, No. 13-CV-05456-HSG, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016) (explaining this

approach "strikes the right balance between the full-bore fairness review for settlement of certified class claims, and doing nothing at all to ensure that putative class members are protected"). *Vargas, supra* at p. 7.

THE FIFTH CIRCUIT OPINION HAS SERIOUS WIDE SPREAD IMPLICATIONS ON ALL CLASS ACTIONS THAT ARE DENIED WITHOUT NOTICE TO THE CLASS

The Fifth Circuit and District Court opinions show that apparently Plaintiffs' Counsel missed the Statute of Limitations, which is not correct under the discovery rule. If this ruling is not overturned, Farmers will use it to deny policyholders their day in court. Millions of other consumers, who do not know they have been defrauded and are members of a putative class that is lost without notice to them, will also lose their day in court.

Farmers admits in an answer to an interrogatory in the *Fairbanks* case that the cost of insurance for Mrs. Fairbanks' $50,000 FUL policy is $40,000 at age 98. ROA 1454-1458, 1541-1543. All class members are also affected in the same manner by this action and the secret interest taking.

THE *OLSON* CLASS ACTION ISSUES WERE NOT PART OF THE *FAIRBANKS* CASE

The Court of Appeals Opinion in *Fairbanks v. Farmers* at page 552 noted the omission of the interest

taking from the Motion for Class Certification, and found as follows:

> Similarly, plaintiffs submitted an internal Farmers memorandum suggesting that, to increase FUL sales, Farmers should increase the interest rate paid and offset the expense by increasing risk rates. **Plaintiffs did not seek to certify a class (or subclass) of all FUL policyholders whose risk rates were increased to offset a higher interest rate.** *Fairbanks v. Farmers*, 197 Cal. App. 4th 544 (2011) at page 554.

The *Olson* Motion for Class Certification proved the unfair interest taking. ROA 1259-1293, 1284, 1245, 1360-1361 as set out in this Petition.

INCORRECT STATEMENTS BY THE FIFTH CIRCUIT THAT THE DISCOVERY RULE AND FRAUDULENT CONCEALMENT DO NOT APPLY TO THIS CASE

The Fifth Circuit opinion incorrectly follows the district court's opinion on the discovery rule. The real rule is cited below. This explains why notice should have been required in this case and is so important.

The case of *Bell v. Showa Denko K. K.*, 899 S.W. 2d 749 (Tex. App.-Amarillo 1995, writ denied) states the requirements for notice to a potential plaintiff:

> "Therefore, the question to be determined is not whether a plaintiff has actual knowledge of the particulars of a cause of action, *Arabian*

> *Shield Development Co. v. Hunt*, 808 S.W.2d 577, 583 (Tex.App.-Dallas 1991, writ denied); rather, it is whether the plaintiff has knowledge of facts which would cause a person to diligently make inquiry to determine his or her legal rights. That knowledge triggers the two-year period of time within which the plaintiff must investigate and determine whether to file suit." Id. p. 754.

Ms. Olson and the putative class did not have notice or a reason to even suspect the fraud and did not waive the Texas discovery rule or fraudulent concealment.

California follows basically the same rule as Texas, and gives the Plaintiff 3 years to file suit after the fraud or deceit is discovered. *Sun'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 701; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808.

"This discovery element [triggering the 3-year statute of limitations time clock] has been interpreted to mean 'the discovery by the aggrieved party of the fraud or facts that would lead a reasonably prudent person to suspect fraud.'" *Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1430. While fraud was not plead by the Petitioner in this instance the Petitioner did cite the *Fox v. Ethicon* case to the district court.

The California Supreme Court held in 2013 that the continuous accrual doctrine and similar common

law rules that can undermine a statute of limitations defense apply to claims brought under California's Unfair Competition Law, Business & Professions Code Section 17200, *et seq*. (the "UCL"). The unanimous decision, in *Aryeh v. Canon Business Solutions Inc.*, No. S184929, 2013 WL 263509 (Jan. 24, 2013), also applies to the discovery rule and the doctrines of continuing violation, equitable tolling and fraudulent concealment.

EQUITABLE TOLLING

A. Equitable Tolling

This is an ongoing fraud, not something that only happened 20 years ago. If we assume there are still 380,000 policies in force at an average annual premium of $850 a year, which is the Olson premium, Farmers is still defrauding its policyholders out of approximately $323,000,000 million dollars a year, **and if not stopped will continue to defraud many of these same policyholders and retirees for the next 20 plus years out of another $ 6.4 billion dollars.** ROA 1360-64, 1260-61, 1284, 1541-43, 1454-1458. Farmers is making an actuarial bet, that they will have to pay very few claims until people are in their 80's and 90's. That is because Farmers knows it can raise the cost of insurance so much their 80 year old policyholders can't afford to pay and will lose their insurance.

The case of *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) is in favor of equitable tolling. The case is an employment case, but recognized

that the use of equitable tolling was permissible and held as follows at page 588:

> "[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." – **The recent Supreme Court case of *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), contains a similar characterization of *Robbins & Myers*.**

The fact is that Mr. Sheller discovered the wrongdoing through discovery of secret materials marked confidential and kept confidential by a Confidentiality Order. The decisions by the Southern District of Texas and the Fifth Circuit that the class is on notice because an attorney discovers documents covered by a confidentiality order is unreasonable. ROA 1259-1293. Rhetorically, what put the Plaintiff or the class on notice that they were being cheated by Farmers?

THE *OLSON* CASE IS DISTINGUISHABLE FROM *CHINA AGRITECH*

The *Olson* case is distinguishable in many respects from the case of *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018). In the *China Agritech* case, the parties stipulated to the statute of limitations, and the suit was based on a drop-in price of a publicly traded security after bad acts came to light. Notice was published in commercial trade publications, and each certification in all 3 suits was based on the same facts.

Most importantly as set out in the Supreme Court Opinion at page 1805: Dean's counsel then published a notice informing shareholders of the certification denial and advising: "You must act yourself to protect your rights. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech."

In *China Agritech*, the shareholders were repeatedly given public notice of the District Court's holding. The District Court and Fifth Circuit holdings are respectfully based on the claim that Ms. Olson and the putative class should have had some sort of psychic perception that they had been cheated by the Farmers Defendants. If Farmers had sent the notice, that would have alerted the class to the fact that they had indeed been cheated by the Farmers Defendants.

Based on this holding, Ms. Olson, the Appellant and class representative, timely filed suit as admitted by Farmers within 4 months of the denial of certification by the California Supreme Court. Crucially in the *Fairbanks* case, the California Court of Appeals invited a 2nd Motion for Class Certification, because of easily overcome technical issues. The 2nd Motion for Class Certification dropped all claims except underfunding without notice to the class or the class representatives.

In *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004), *supra* at p. 107, the 3rd Circuit discussed policy reasons as to why a 2nd class should be allowed, stating:

> . . . **In assessing that question, the Ninth Circuit distinguished its own decision in *Robbin*, as well as the *Korwek*, *Griffin*, and *Salazar-Calderon* decisions, on the basis that the plaintiffs were "not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Id.* at 1149.**

The *Yang* court reasoned, at p. 105:

> The Second Circuit in *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987) held that tolling did not apply "to permit the filing by putative class members of a subsequent class action nearly identical in scope to the original class action which was denied certification." *Id.* at 876. Contrary to the broad scope of certification requested by the plaintiff, the district court in the original class suit, citing problems of manageability and intraclass conflict, decided to "limit drastically the scope of the class certified" to be coextensive with the lead plaintiff's trading behavior in the silver futures market. *Id.* Purported members of the class excluded by the narrowed scope then filed a new class action requesting certification of a class identical in scope to the broad request rejected in the original suit. *Id.* at 876. The Second Circuit rightly declined to toll the statutory period in these circumstances, as the district court had found that the broad class requested would be unwieldy and unmanageable regardless of the class representative. Indeed, **the Second Circuit did**

> **not foreclose tolling the limitations period for subsequent class actions asserting an appropriate scope. *Id.* ("This Court notes that it leaves for another day the question whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe.*").**

The *Yang* court continued, at p. 105:

> In taking this approach, *Korwek* followed the Fifth Circuit's decision in *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), which found that "*American Pipe* tolling does not apply to permit putative class members to file a subsequent class action." *Korwek*, 827 F.2d at 877-78. Significantly, in *Salazar-Calderon* the putative class had been denied certification in the first action because of defects in the purported class itself. The Fifth Circuit noted that common questions of law and fact did not predominate among the putative class members and that "a class action was not necessarily the superior method for handling the controversy." *Salazar-Calderon*, 765 F.2d at 1350. Similarly, in the leading First Circuit case which followed *Korwek* and *Salazar-Calderon*, the refusal to allow tolling in sequential class actions was in the context of a district court having based its earlier denial of class certification on deficiencies in the class itself. *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 8 n. 4 (1st Cir. 1998) (class members not "similarly situated" due to many factual differences between them); *see also Andrews v. Orr*, 851 F.2d

> 146, 149 (6th Cir. 1988) (applying *Korwek* and *Salazar-Calderon* without noting the reason for the district court's denial of class certification).

Yang, at p. 110:

> The court cites a principle regarding securities laws which is analogous to the secret interest taking in the *Olson* case and which states: As this Court has stated, "Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, since the effectiveness of the securities laws may depend in large measure on the application of the class action device." *Eisenberg v. Gagnon*, 766 F.2d 770, 775 (3d Cir. 1985).

Based on the number of the 215,000 plus people involved in the class and the secrecy of the Farmers Respondents in taking the class members' money, a class action is the superior means to resolve the situations.

That is exactly the reasoning that should be applied to the *Olson* case. Otherwise as noted in *Yang* at p. 111:

> Drawing the line arbitrarily to allow tolling to apply to individual claims but not to class claims would deny many class plaintiffs with small, potentially meritorious claims the opportunity for redress simply because they were unlucky enough to rely upon an inappropriate lead plaintiff. For many, this would be

> the end result, while others would file duplicative protective actions in order to preserve their rights lest the class representative be found deficient under Rule 23. Either of these outcomes runs counter to the policy behind Rule 23 and, indeed, to the reasoning employed by the Supreme Court in *American Pipe* and *Crown, Cork & Seal*, 462 U.S. 345 at 350-51, 103 S.Ct. 2392 (1983).

Again, at p. 112, the 3rd Circuit in *Yang* stated a valid policy reason as to why the *Olson* case should not be dismissed: **Rather than arbitrarily eliminate the possibly meritorious claims of countless class members, we prefer to see careful case management employed to avoid the prospect of "indefinite" tolling.** The Supreme Court should employ the same reasoning in the *Olson* case. This reasoning is actually similar to the 5th Circuit holding in *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520 (5th Cir. 2008) which allowed a class member to wait until the appeal was over to take other action.

The case of *Weitzner v. Sanofi Pasteur Inc*., 909 F.3d 604 (3d Cir. 2018), is easily distinguishable from the *Olson* case because the named Plaintiff in *Weitnzer* was the same person in both class actions and the Defendants did not act in secret. That is not the *Olson* case and if Olson had filed suit before the final determination of the *Fairbanks* case it would have been met with at least a Motion for Abatement by the Farmers Defendants. All of the policy reasons in *Weitzner* as to

why the *Olson* case should go forward as a class are present.

The Opinion in this case should be reversed because it conflicts with 5th Circuit law as well as the law of numerous other jurisdictions which will not be repeated again.

REQUIREMENTS OF NOTICE

The courts have held that adequate notice may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable follow up measures" that may be available. In the case of *Jones v. Flowers*, 547 U.S. 220, 235 (2006), the court held that the state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so. In addition, notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The case of *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218 (2d Cir. 2012) held at page 224:

> **To comport with due process, the notice provided to absent class members must be "the best practicable, 'reasonably calculated; under all the circumstances, to apprise interested parties of**

> **the pendency of the action and afford them an opportunity to present their objections.'** (citations omitted)." "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113-14 (2d Cir. 2005).

The case of *Macarelli v. Cabell*, 1976 58 Cal. App. 3d 52 at page 54 held:

> The Los Angeles Superior Court then adopted rule 470 of the Class Action Manual which provides in relevant part: "Dismissals in class actions are also subject to prior court approval. . . ."
>
> There was no court approval when class counsel dropped the claims.

The Supreme Court and other cases on notice are all distinguishable from the *China Agritech* case. The class should be certified as all the elements for the class action have been met including adequacy of the class representative and class counsel. The Motion for Certification is found at ROA 1214-1248 and the Exhibits to the Motion are ROA 1249-1401.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner Debe Olson and the putative class prays that this case is reversed because there is a lack of

adequate notice to Ms. Olson and the putative class who had no reason to know that they had been defrauded by Farmers. The Court should require adequate notice to protect the rights to due process of unsuspecting class members.

Respectfully submitted,

SHELLER LAW FIRM, PLLC

DAVID SHELLER
360 FM 1959
Houston, Texas 77034
Telephone: (832) 841-1175
david@shellerlawfirm.com
Attorney for Petitioner
Debe Olson