CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Hilda L. Solis, Secretary of Labor, United States Department of Labor

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Amy J. Oliver, U.S. Attorney's Office, 185 S. State St. #300, SLC, UT 84111, 801-524-5682

DEFENDANTS
David Rushton, Fooptube, LLC, and The Fooptube, LLC 401(k) Profit Sharing Plan

County of Residence of First Listed Defendant Salt Lake County, Utah
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☒ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity)**:
Employee Retirement Income Security Act, 29 USC 1001 et seq.

Brief description of cause:
Action to recover losses to 401(k) Plan and appoint an Independent Fiduciary to terminate 401(k) Plan

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23

DEMAND $ 114,808.13

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 11/15/2010

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

HILDA L. SOLIS, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. DAVID RUSHTON, FOOPTUBE, LLC, and THE FOOPTUBE, LLC 401(k) PROFIT SHARING PLAN, Defendants.	))))))))))))))	CASE NO.: 2:10cv01128 TC **COMPLAINT** Honorable Tena Campbell

Plaintiff, Hilda L. Solis, Secretary of Labor, United States Department of Labor (the "Secretary"), alleges as follows:

1. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act") as amended, 29 U.S.C. §§ 1001 et seq. and is brought by the Secretary against Defendants David Rushton and Fooptube, LLC, each as fiduciaries to the Fooptube, LLC

401(k) Profit Sharing Plan (the "Plan"). The Secretary brings this action to obtain all appropriate relief in order to redress violations and enforce the provisions of Title I of ERISA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

3. Venue with respect to this action lies in the District of Utah pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

THE PARTIES

4. Plaintiff is the Secretary of the United States Department of Labor who has authority to bring this civil action under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5).

5. At all times relevant to this action, Defendant David Rushton was a resident of the city of South Jordan, Salt Lake County, Utah, maintained a principal place of business in and conducted business in the city of South Jordan, Salt Lake County, Utah, was an owner in and President of Fooptube, LLC, a Utah corporation whose business headquarters were located in South Jordan, Utah, and was also a named trustee of the Plan.

6. At all times relevant hereto, Defendant Fooptube, LLC, was a Utah corporation, was licensed to and did in fact conduct business in the State of Utah, maintained a principal place of business and was headquartered in South Jordan, Utah, employed citizens of the State of Utah, and was the sponsor, the named Plan Administrator, and a named fiduciary to the Plan. At the present time, the Secretary believes that Defendant Fooptube, LLC is no longer in operation.

7. The Fooptube, LLC 401(k) Profit Sharing Plan is named as a defendant pursuant to Fed.R.Civ.P. 19(a) solely to assure that complete relief can be granted.

GENERAL ALLEGATIONS

8. The Plan, established on or about January 1, 2006, is a defined contribution, deferred compensation plan which allows an employee to elect to defer a portion or his/her compensation and have that amount contributed to the Plan by Fooptube, LLC, the employer and Plan sponsor.

9. The Plan is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), and subject to coverage of the Act under ERISA § 4(a), 29 U.S.C. § 1003(a).

10. At all times relevant herein, Defendant Fooptube, LLC, acting through its corporate officers, including Defendant David Rushton, acting individually or in concert with one or more other individuals, was vested with and exercised discretionary authority or control respecting the management of the Plan, and/or exercised authority or control respecting the management or disposition of the assets of the Plan, and/or had discretionary authority and/or discretionary responsibility in the administration of the Plan. Therefore, Defendants Fooptube, LLC and David Rushton at all times relevant herein, have each been a fiduciary with respect to the Plan pursuant to ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii).

11. At all times relevant herein, Fooptube, LLC, was an employer whose employees were covered by the Plan. Therefore, Fooptube, LLC, is a party in interest with respect to the Plan pursuant to ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C).

12. At all times relevant herein, Defendant David Rushton was a fiduciary of the Plan and was an officer and/or a director of Fooptube, LLC ("Fooptube"), an employer whose

employees were covered by an ERISA employee benefit plan. Therefore, Defendant David Rushton is a party in interest with respect to the Plan pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. § 1002(14)(A) and (H).

13. During the pay periods commencing from on or about January 15, 2007, through on or about December 15, 2007, the Defendants failed to timely forward to the Plan contributions totaling $132,463.60, withheld from employee participants' paychecks. The contributions became Plan assets as of the earliest date on which they could reasonably have been segregated from Fooptube's general assets. The withheld amounts could reasonably have been segregated from Fooptube's general assets and forwarded to the Plan within five business days of each payroll date. Thus, the amounts became Plan assets within five business days of the dates that such amounts were withheld from employee wages, pursuant to 29 C.F.R. § 2510.3-102(a). As a result of the Defendants' failure to timely forward the contributions, the Plan and its participants suffered lost interest earning on the untimely forwarded contributions from plan year 2007.

14. During the pay periods commencing from on or about January 15, 2007, through on or about December 15, 2007, the Defendants failed to forward to the Plan contributions totaling of $2,532.86, withheld from participants' wages. The withheld amounts could reasonably have been segregated from Fooptube's general assets within five business days of each payroll date. As such, the outstanding amounts became Plan assets within five days of the dates that they were withheld from employee wages, pursuant to 29 C.F.R. § 2510.3-102(a). Although the Defendants could reasonably have segregated the employee contributions from Fooptube's general assets and forwarded them to the Plan within five business days of each

payroll date, Defendants failed to segregate and forward the contributions to the Plan. As a result of Defendants' failure to forward the contributions, the Plan and its participants have suffered a loss of $2,532.86. In addition, the Plan and its participants suffered lost interest earning on the outstanding contributions from plan year 2007.

15. During the pay periods commencing from on or about February 15, 2008, through on or about November 15, 2008, the Defendants withheld $104,778.05 from paychecks of Plan participants as elective salary deferrals for contribution to the Plan. Although the Defendants could reasonably have segregated such employee contributions from Fooptube's general assets within five business days of each payroll date, Defendants failed to segregate and forward $104,778.05 to the Plan. The withheld amounts are assets of the Plan pursuant to 29 C.F.R. § 2510.3-102(a). As a result of the Defendants' failure to forward the contributions, the Plan and its participants have suffered a loss of $104,778.05. In addition, the Plan and its participants suffered lost interest earning on the outstanding contributions from plan year 2008.

16. Through September 30, 2010, the Plan and the Plan participants have lost $7,497.22 in interest earning as a result of the unforwarded employee contributions and the untimely forwarded employee contributions described in paragraphs 13, 14 and 15.

17. Defendants Fooptube, LLC and David Rushton stopped paying the Plan's Third Party Administrator, Plan Administrators, Inc. ("PAI"). PAI sent a notice of its intent to resign as the Third Party Administrator in February 2010 and discontinued servicing the Plan on April 19, 2010.

18. Defendants Fooptube, LLC and David Rushton ceased administering the Plan in April 2010. Since that month, Defendants Fooptube, LLC and David Rushton have not

appointed a discretionary fiduciary to administer and manage the Plan and its assets, or to ensure the orderly termination and liquidation of the Plan. No individual or entity has taken fiduciary responsibility for the operation and administration of the Plan and its assets. As a Result, the Plan is abandoned.

19. MG Trust Company, LLC of Denver, Colorado is the custodian of Plan assets and can only disburse assets at the direction of a plan administrator, trustee, named fiduciary, or court-appointed fiduciary.

20. The Plan has not been formally terminated.

21. As of May 7, 2010 the Plan had 94 participants and total assets of $156,491.74.

22. Because of the facts and circumstances set forth in the paragraphs above, the Plan does not have named fiduciaries or trustees with exclusive authority and discretion to manage and control its assets as required by ERISA § 402(a), 29 U.S.C. § 1102(a); and ERISA § 403(a), 29 U.S.C. § 1103(a); and there is no one other than this Court with the authority to appoint a new trustee.

23. Because of the facts and circumstances set forth in the paragraphs above, participants are unable to access their account balances, either to reinvest them in other tax-qualified retirement savings vehicles before retirement, or to draw them down upon retirement. Because the basis upon which payments are made from the Plan are not and cannot be specified without a trust, the Plan exists in violation of ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4).

24. A representative of the Employee Benefits Security Administration ("EBSA") has identified Saakvitne Law Corporation, located in Santa Monica, California, to serve as an independent fiduciary for purposes of terminating the Plan, locating missing Plan participants, if

any, distributing the Plan's assets, filing outstanding Annual Report Forms 5500, and amending the Plan, if necessary. The Saakvitne Law Corporation has agreed to a flat fee of $11,000.00 to provide these services, to be paid from the Plan.

VIOLATIONS OF ERISA

25. During the relevant time period herein, Defendants David Rushton and Fooptube, LLC acting by and through its officers, each failed to act to secure the transfer, or cause the transfer to the Plan in a timely manner the withheld and designated amounts described in paragraphs 13, 14 and 15 which said amounts were withheld from the wages of employees of Defendant Fooptube, LLC as elective salary deferrals.

26. At all times relevant to this action, Defendants David Rushton and Fooptube, LLC acting or failing to act through its officers, each failed to take action to determine the assets of the Plan, to assert control over the Plan assets or to insure that the Plan assets would be protected from losses.

27. By conduct described above in paragraphs 25 and 26, Defendants David Rushton and Fooptube, LLC:

(a) failed to discharge his/its fiduciary duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

(b) failed to discharge his/its fiduciary duties with respect to the Plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like

capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

(c) failed to discharge his/its fiduciary duties in accordance with the documents and instruments governing the Plan, in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D);

(d) caused the Plan to engage in transactions that he/it knew or should have known constituted a direct or indirect transfers to, or use by or for the benefit of, a party in interest, of assets of the Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D);

(e) dealt with the assets of the Plan in his/its own interest or for his/its own account, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1);

(f) acted in transactions involving the Plan on behalf of a party whose interests were adverse to the interests of the Plan or of the Plan's participants and beneficiaries, in violation of ERISA §406(b)(2); 29 U.S.C. §1106(b)(2); and

(g) permitted the assets of the Plan to inure to the benefit of an employer in violation of ERISA §403(c)(1), 29 U.S.C. §1103(c)(1).

WHEREFORE, the Secretary prays that this Court enter an ORDER:

1. Permanently enjoining Defendants David Rushton and Fooptube, LLC from violating the provisions of Title I of ERISA;

2. Ordering Defendants David Rushton and Fooptube, LLC to restore to the Plan all losses attributable to his/its fiduciary breaches and/or attributable to prohibited transactions in

which he/it engaged, including foregone earnings to the date of judgment, and post-judgment interest;

3. Ordering Defendants David Rushton and Fooptube, LLC to correct the prohibited transactions identified in the Complaint;

4. Appointing Saakvitne Law Corporation as independent fiduciary to administer the Plan and effectuate the distribution of Plan assets to the participants and beneficiaries and the Plan's termination for a fee of $11,000.00 to be paid by the Plan;

5. Requiring Defendants David Rushton and Fooptube, LLC their agents, accountants, attorneys, and advisors to cooperate with the independent fiduciary or other such person(s) appointed by the Court and to provide the independent fiduciary or other such person(s) with all books, records, documents and information necessary for the proper management and administration of the Plan and its assets;

6. Removing Defendants David Rushton and Fooptube, LLC as fiduciaries of the Fooptube, LLC 401(k) Profit Sharing Plan and permanently enjoining Defendants David Rushton and Fooptube, LLC from serving as a fiduciary for any plan covered by ERISA;

7. Awarding Plaintiff the costs of this action; and

8. Providing such further relief as is just and equitable.

DATED this 15th day of November, 2010.

CARLIE CHRISTENSEN
United States Attorney

/s/ Amy J. Oliver

AMY J. OLIVER
Assistant United States Attorney

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