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FONECASH INC
Form 8-K
June 07, 2002

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON D.C. 20549

FORM 8-K

CURRENT REPORT
PURSUANT TO SECTION 13 OR 15(D) OF
THE SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of earliest event reported) May 14, 2002

FoneCash, Inc.

(Exact name of registrant as specified in its charter)

DELAWARE

(State or other jurisdiction of incorporation)

0-30536

(Commission File Number)

90 PARK AVENUE, SUITE 1700
NEW YORK, NEW YORK

(Address of Principal Executive Offices)

22-3530573

(IRS Employer Identification No.)

10016-1301

(Zip Code)

(212) 984-0641

(Registrant's telephone number, including area code)

NOT APPLICABLE

(Former Name or Former Address, if Changed Since Last Report)

ITEM 5. OTHER EVENTS

1. On May 9, 2002, FoneCash and its Chairman and Chief Executive Officer executed and entered into a consent to Preliminary Injunctions ("Consent") in the pending action, Securities and Exchange Commission vs. FoneCash, Inc. and Daniel E. Charboneau ("Civil Action"). This Consent was without admitting or denying the allegations of the Commission's complaint. The Proposed Order enjoins FoneCash, Inc. and Daniel E. Charboneau, during the pendency of the Civil Action, from violating, directly or indirectly, Section 17(a) of the Securities Act of 1933 [15 U.S.C. 77q(a)] and Sections

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10(b) and 13(a) of the Securities Exchange Act of 1934 ("Exchange Act"), {15U.S.C. 78j(b) and 78m(m)} and Rules 10b-5, 12b-20, 13a-1 and 13a-13 [17 C.F.R. 240.10b-5, 240.12b-20, 240.13a-1 and 240.13a-3], thereunder, and enjoins Charboneau from violating Sections 16(a) of the Exchange Act, [15 U.S.C. 78p(a)] and Rules 16a-3 [17C.F.R. 240.16a-2 and 240.16a-3], thereunder.

A copy of the Consent and Proposed Order is attached as Exhibit A. The Consent is subject to the approval of the Commission.

- 2. On May 21, 2002, FoneCash, Inc. by its Chairman and Chief Executive Officer, executed an Offer of Settlement to the administrative proceeding (the "Proceeding") which is pending before the Securities and Exchange Commission to suspend the Registration Statement and all amendments previously filed by FoneCash, Inc. The Offer of Settlement agrees to have the Commission issue an Order suspending the Registration Statement and all amendments thereto. This agreement and the Consent to the findings contained therein are limited solely to the Proceeding and any other proceeding to which the Commission is a party, except the pending Civil Action, and are made without admitting or denying the accuracy of the allegations in the Divisions' Statement of Matters or any Order Making Finding and Issuing Stop Order with may be issued.

A copy of the Offer of Settlement is attached as Exhibit B.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, Civil Action No. 1:02CV00651-RJL
FONECASH, INC., and DANIEL E. CHARBONEAU, Defendants,

CONSENT TO PRELIMINARY INJUNCTION

1. Defendants FoneCash, Inc. ("FoneCash") and Daniel E. Charboneau ("Charboneau") submit to the in personam jurisdiction of this Court over them, acknowledge service of summons and the Complaint in this matter, admit the jurisdiction of this Court over the subject matter of this action, waive the

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entry of findings of the fact and conclusions of law pursuant to Rules 52 and 65 of the Federal Rules of Civil Procedure, and hereby consent to the entry of a preliminary injunction ("Order") without further notice in the form annexed hereto and incorporated by reference herein.

2. Defendants FoneCash and Charboneau, without admitting or denying any of the allegations of the Commission's Complaint, except as to jurisdiction with they admit, consent to the entry of the order attached as Exhibit A which enjoins FoneCash and

Exhibit A

Charboneau from violating, directly or indirectly, Section 17(a) of the Securities Act of 1933 [15 U.S.C. 77q(a)] and Sections 10(b), and 13(a) of the Securities Exchange Act of 1934 ("Exchange Act"), [15 U.S.C. 78j(b) and 78m(a)] and Rules 10b-5, 12b-20, 13a-1 and 13a-13 [17 C.F.R. 240.10b-5 240.12b-20, 240.13a-1 and 240.13a-13], thereunder, and enjoins Charboneau from violating Sections 16(a) of the Exchange Act, [15 U.S.C.78p(a)] and Rules 16a-2 and 16a-3 [17 C.F.R. 240.16a-3], thereunder.

3. Defendants FoneCash and Charboneau enter into this Consent voluntarily and acknowledge that no promise or threat of any kind whatsoever has been made by Plaintiff Securities and Exchange Commission or any member, officer, agent or representative thereof to induce them to enter into this stipulation and consent.

4. Defendants FoneCash and Charboneau waive any right they may have to appeal from the entry of the Order.

5. Defendants FoneCash and Charboneau agree that the Order may be presented by the Commission to the Court for signature without further notice.

6. Defendants FoneCash and Charboneau agree that this Consent shall be incorporated into the Order with the same force and effect as if fully set forth therein.

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7. Defendants FoneCash and Charboneau agree that they will not oppose the enforcement of the Order on the ground, if nay exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and they hereby waive any objection they may have based thereon.

8. Defendants FoneCash and Charboneau hereby understand that the Plaintiff, at its sole and exclusive discretion, may refer this matter or any information or evidence gathered in connection therewith, or derived therefrom, to any person or entity, public or private, having criminal, civil or administrative jurisdiction for action thereby.

9. Defendants FoneCash and Charboneau further state that they understand that the Plaintiff cannot and does not confer upon them, or upon any other person or entity, immunity from any criminal proceeding for any actions related to or arising from this or any other matter.

Executed this 9th day of May, 2002.
--- ---

/s/ Daniel E. Charboneau

FoneCash, Inc., and Daniel E. Charboneau
By: Daniel E. Charboneau, individually
and as president, chairman and CEO of FoneCash

State of New York

County of New York

On this 9th day of May, 2002, before me personally appeared Daniel E.
--- ---
Charboneau, known to me to be the person who

executed the foregoing Stipulation and Consent and he acknowledged to me that he executed the same.

/s/

NOTARY PUBLIC

DATED: May 9, 2002.

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MY COMMISSION EXPIRES: _____

[Notary Seal]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|-------------------------|---|----------------------------------|
| _____ | : | |
| SECURITIES AND EXCHANGE | : | |
| COMMISSION, | : | |
| | : | |
| Plaintiff, | : | Civil Action No. 1:02CV00651-RJL |
| | : | |
| v. | : | |
| | : | |
| FONECASH, INC., and | : | |
| DANIEL E. CHARBONEAU, | : | |
| | : | |
| Defendants, | : | |
| | : | |
| _____ | : | |

PLAINTIFF'S NOTICE OF FILING CONSENT TO PRELIMINARY INJUNCTION

AND PROPOSED PRELIMINARY INJUNCTION

The Securities and Exchange Commission, plaintiff in this matter, hereby notifies all parties that it has filed a consent to preliminary injunction signed by the defendants and a proposed preliminary injunction.

DATED: May 13, 2002

Respectfully Submitted,

/s/ William P. Hicks

William P. Hicks
District Trial Counsel
Georgia Bar No. 351649
D.C. Bar No. 426980

Counsel for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
3475 Lenox Road, N.E. Suite 1000
Atlanta, Georgia 30326
(404) 842-7612

LOCAL COUNSEL

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Mark J. Kreitman, Esq.

D.C. Bar No. 260828
Securities and Exchange
Commission
450 5th St., NW
Washington DC 20549
Tel. (202) 942-4677

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Certificate of Service

I hereby certify that on this 13th day of May, 2002, I caused copies of the

foregoing to be served by U.S. Mail, in a properly addressed envelope as
follows:

FoneCash, Inc.
c/o Daniel E. Charboneau, President
90 Park Ave.
New York, New York 10016

Daniel E. Charboneau
475 Dobbs Ferry Road
White Plains, NY 10607

Michael S. Krome, Esq.
8 Teak Court
Lake Grove, NY 11755
(Attorney for FoneCash)

Malcolm Taub, Esq.
Taub & Shoman
New York, NY 10019
(Counsel for Defendants)

/s/ William P. Hicks

Attorney for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|-------------------------|---|----------------------------------|
| SECURITIES AND EXCHANGE | : | |
| COMMISSION, | : | |
| | : | |
| Plaintiff, | : | Civil Action No. 1:02CV00651-RJL |
| | : | |
| v. | : | |
| | : | |
| FONECASH, INC., and | : | |
| DANIEL E. CHARBONEAU, | : | |
| | : | |
| Defendants, | : | |
| | : | |

ORDER OF PRELIMINARY INJUNCTION

Plaintiff, Securities and Exchange Commission ("Commission"), having filed its complaint in this matter against defendants FoneCash, Inc. ("FoneCash") and Daniel E. Charboneau ("Charboneau"), said defendants having entered a general appearance and consented to the jurisdiction of this Court over them and over the subject matter of this action, having waived entry of findings of fact and conclusions of law pursuant to Rules 52 and 65 of the Federal Rules of Civil Procedure with respect to the relief granted in this order, and without admitting or denying any of the allegations of the complaint having consented to the entry of this order, it is hereby,

I.

ORDERED that, until further order of this Court, defendants FoneCash and Charboneau, their agents, servants, employees, attorneys and those persons in active concert or participation with them, in connection with the purchase or sale or in the offer or sale of securities, by use of any means or instruments of transportation or communication in interstate commerce, or by the mails or any facility of any national securities exchange, be, and they are enjoined

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from, directly or indirectly:

- (1) employing any device, scheme or artifice to defraud;
- (2) engaging in any act, practice or course of business which operates or would operated as a fraud or deceit upon any person;
- (3) obtaining money or property by means of any untrue statement of a material fact; or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (4) making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading,

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in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, thereunder.

II.

IT IS FURTHER ORDERED that, until further order of this Court, defendants FoneCash and Charboneau, their officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, be, and they hereby are, enjoined from, directly or indirectly, filing annual, quarterly or other reports with the Commission which are materially false and misleading, in violation of Section 13(a) of the Exchange Act [15 U.S.C. 78m(a)] and Rules 12b-20, 13a-1 and 13a-13 thereunder [17 C.F.R. 240.12b-20, 240.13a-1 and 240.13a-13].

III.

IT IS FURTHER ORDERED that, until further order of this Court, defendant Charboneau, his officers, agents, servants, employees, and those persons in

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active concert or participation with them who receive actual notice of this Order by personal service or otherwise, be, and they hereby are, enjoined from, directly or indirectly, failing to file accurate and timely reports as required by Section 16(a) of the Exchange Act [15 U.S.C. 78p(a)] and Rules 16a-2 and 16a-3 thereunder [17 C.F.R. 240.16a-2 and 240.16a-3], in

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connection with ownership of or transactions in any security registered under Section 12 of the Exchange Act.

IV.

IT IS FURTHER ORDERED that this Court will retain jurisdiction over this matter and the defendants for all purposes and will order other and further relief that this Court deems appropriate under the circumstances.

Done and ordered at _____ o'clock _____ m. this _____ day of _____, 2002.

UNITED STATES DISTRICT JUDGE

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UNITED STATES OF AMERICA

| | | |
|-----------------------------|---|---------------------|
| _____ | : | |
| In the Matter of | : | |
| | : | |
| a Registration Statement of | : | Offer of Settlement |
| | : | |
| | : | |
| FONECASH, INC., | : | |
| 90 Park Ave. | : | |
| New York, NY 10016 | : | |
| | : | |
| _____ | : | |

FoneCash, Inc. ("FoneCash"), pursuant to Rule 240 (a) of the Rules of Practice of the Securities and Exchange Commission ("Commission"), submits this

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Offer of Settlement ("Offer") of proceedings pursuant to Section 8(d) of the Securities Act of 1933 ("Securities Act") instituted by the Commission.

I.

By submitting this Offer, FoneCash hereby acknowledges its waiver of those rights specified in Rules 240(c)(4) and (5) of the Commission's Rules of Practice.

II.

This Offer is submitted only for the purpose of settling this proceeding and with the express understanding that it will not be used in any way in this or any other proceedings unless this Offer is accepted by the Commission. If this Offer is not accepted by the Commission, this Offer is withdrawn without prejudice to FoneCash and shall not become a part of the record in these or any other proceedings, except for the waiver expressed in Section II with respect to Rule 240(c)(5) of the Commission's Rules of Practice.

III.

On the basis of the foregoing, FoneCash hereby admits the jurisdiction of the Commission over it, and over the subject matter of the proceedings instituted with regard to its registration statement and amendments at issue in this proceeding.

Exhibit B

Solely for the purpose of this proceeding and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, except the pending civil litigation SEC v. FoneCash, Inc. et al., Civil Action No.

1:02CV000651RJL (D.D.C.), FoneCash, without admitting or denying the accuracy of the allegations in the Division's Statement of Matters or any Order Making Findings and Issuing Stop Order which may be issued pursuant to his Offer, waives any objections to the materiality of those matters and hereby consents to the entry by the Commission of an Order Making Findings and Issuing Stop Order ("Order").

Making findings that:

1. On December 26, 2001, FoneCash, with offices located at 90 Park Ave., New York, NY filed a registration statement with the Commission on Form SB-2. FoneCash filed a preeffective amendment on January 14, 2002. Pursuant to the provisions of Section 8(a) of the Securities Act, the registration statement became effective on January 16, 2002. FoneCash filed post effective amendments on March 6, 2002, March 14, 2002 and March 25, 2002. The post effective amendments have not become effective. FoneCash's registration statement describes the offering as an offering of 7,275,730 shares of FoneCash common stock by certain stockholders of FoneCash who will receive all of the proceeds from the sales, and who may offer their shares, from time to time, through public or private transactions.

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2. The registration statement and amendments misrepresent or omit to state material facts required to be stated therein, including but not limited to, failing to disclose that a patent to which FoneCash has rights and which purportedly will not expire until 2004, has lapsed, failing to disclose a substantial increase in the number of shares outstanding, failing to disclose that a contract, attached to the registration statement, pursuant to which FoneCash was to receive an advance of funds, has been voided, and including financial statements audited by an accountant who was not independent, as required by the Commission's regulations governing the offer and sale of securities to the public.

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1. FoneCash agrees that any order issued pursuant to this offer may, at the option of the Commission, contain a footnote stating "The findings herein are made pursuant to the Offer of Settlement of FoneCash and are not binding on any other person or entity named as a respondent in this or any other proceeding.

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Issuing an Order suspending the effectiveness of the registration statement filed by FoneCash and all amendments thereto.

IV.

FoneCash states that it has read the Offer and declares that no offer, promise, threat or inducement of any kind has been tendered to it by the Commission, its staff or its representatives to induce it to make this Offer, and it represents that this Offer is a voluntary act on its part and that it understands its consequences.

Consistent with the provisions of 17 C.F.R. Section 202.5(f), FoneCash waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. FoneCash also hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996 or any other provision of law to pursue reimbursement of attorney's fees or other fees, expenses or costs expended by FoneCash to defend against this action. For these purposes, FoneCash agrees that FoneCash is not the prevailing party in this action since the parties have reached a good faith settlement.

FoneCash understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings" (17 C.F.R. Section 202.5). In compliance with this policy, FoneCash agrees (i) not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the Order or creating the impression that the Order is without factual basis, and (ii) that upon the filing of this offer of settlement, FoneCash hereby withdraws any papers previously filed in this proceeding to the extent that they deny, directly or indirectly, any allegation in the Order. If FoneCash breaches this agreement, the Division of Enforcement may petition the Commission to vacate the Order and restore this proceeding to its active docket. Nothing in this provision affects FoneCash's: (i) testimonial obligations; or (ii) right to take legal position in litigation in which the Commission is not a party.

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DATED: May 21, 2002

/s/ Daniel E. Charboneau

FoneCash, Inc., by Daniel E.
Charboneau, president, chairman and
chief executive officer

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On this 22nd day of May, 2002, before me personally appeared Daniel E.
Charboneau, to me known to be the person who executed the foregoing Offer of
Settlement.

/s/

NOTARY PUBLIC

My Commission expires: [Notary Seal]

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