

ATTACHMENTS AND EXHIBITS

ATTACHED: LOWER COURT RULINGS IN THIS CASE

Final Order of District Court

Correction to Dismissal Without Prejudice

Award of Fees

Unpublished Memorandum Appellate Ruling

Denial of Rehearing

Denial of Stay

Mandate

Judgment

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

9 Brian Erskine, No. CV-20-08123-PCT-JJT
10 Plaintiff, ORDER
11 v.
12 Forrest Fenn,
13 Defendant.
14

15 At issue is Defendant Forrest Fenn's Motion to Dismiss for Lack of Personal
16 Jurisdiction (Doc. 15, MTD), to which Plaintiff Brian Erskine filed a Response (Doc. 21,
17 Resp.) and Defendant filed a Reply (Doc. 31). The Court also considers multiple sets of
18 additional motions. These include Plaintiff's Motion to Supplement the Complaint
19 (Doc. 22), Defendant's Response (Doc. 26), and Plaintiff's Reply (Doc. 27); Plaintiff's
20 Motion to Transfer Jurisdiction (Doc. 29); Defendant's Motion to Strike Improper and
21 Unauthorized Filings (Doc. 32), to which Plaintiff filed a Response (Doc. 33), and
22 Defendant filed a Reply (Doc. 34); Defendant's Motion to Substitute Party (Doc. 36),
23 Plaintiff's Response (Doc. 37), and Defendant's Reply (Doc. 38); and lastly Plaintiff's
24 Motion to Substitute Party (Doc. 39), Defendant's Response (Doc. 41), and Plaintiff's
25 Reply (Doc. 43). For the following reasons, the Court will grant Defendant's Motion to
26 Dismiss for lack of personal jurisdiction as well as Defendant's Motion to Substitute Party.
27 The remaining motions are denied as moot.
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1 **I. BACKGROUND**

2 As a preliminary matter, Plaintiff added facts to his Response to Defendant's Motion
3 to Dismiss that were not in the Complaint. Defendant has not objected to the inclusion of
4 these facts, which are relevant, and in some cases, support his argument that the Court does
5 not have personal jurisdiction. Therefore, the Court will consider the additional facts at this
6 stage of the proceedings.

7 In 1998, Defendant hid a treasure chest (the "Chest") in an outdoor location in the
8 Western United States. Subsequently, in 2010, Defendant published a memoir titled *The*
9 *Thrill of the Chase* (the "Memoir") that included a poem providing clues that led to the
10 Chest's location. (Compl. Ex. 7 at 3.) Over the next several years, the Memoir increased in
11 popularity and many people tried to solve the clues in the poem and find the Chest. (Compl.
12 Ex. 9.) In 2014, Defendant travelled to Tucson, Arizona on a one-day trip to accept the
13 "True Westerner Award" from *True West* magazine for his work on the Memoir.

14 Plaintiff learned of the Memoir and the hidden Chest in 2016 while in Cambodia
15 and alleges that in August 2018 he "solved" the poem and located the spot where the Chest
16 should have been located. (Resp. at 11; Compl. ¶¶ 18, 23.) However, Plaintiff acknowledges
17 that he never physically located or possessed the Chest. (Compl. ¶ 26.)

18 Plaintiff alleges that he subsequently reached out to Defendant in order to inform
19 him that he had solved the poem but had not located the Chest. (Compl. ¶ 24.) He alleges
20 that Defendant was confused as to why Plaintiff had contacted him, asking "Why are you
21 doing this?" (Resp. at 12.) Plaintiff does not allege that Defendant ever acknowledged that
22 he had solved the poem or that he had located the spot where the chest was hidden.
23 Defendant subsequently verified that a different searcher found the Chest in Wyoming.
24 (Resp. at 12.)

25 Plaintiff is a resident of Yavapai, Arizona and Defendant was a resident of Santa
26 Fe, New Mexico. Defendant lived in Phoenix for approximately four years while serving
27 in the military from 1959-1964, and with the exception of his one-day trip in 2014, has not
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1 returned to, owned property in or had any other connection to Arizona since then. (MTD
2 Ex. 1 ¶¶ 2-3.)

3 On May 26, 2020, Plaintiff filed a Complaint in the District of Arizona under the
4 Court's diversity jurisdiction alleging breach of contract under Arizona state law. Plaintiff
5 alleges that Defendant's poem created a unilateral contract that Plaintiff performed by
6 following the clues and "solving" the puzzle. He contends that Defendant breached the
7 contract because the chest was not in the location set forth in the poem. Defendant moved
8 to dismiss the Complaint for lack of personal jurisdiction. In the interim, Defendant passed
9 away on September 7, 2020 and Defendant's estate moved to substitute Mr. Fenn's
10 daughter, Zoe Fenn Old, who was appointed the Personal Representative of Defendant's
11 estate.

12 II. LEGAL STANDARD

13 A federal court must have jurisdiction over the parties to adjudicate a matter. *Ins.*
14 *Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). The party
15 invoking the jurisdiction of the federal court has the burden of establishing that personal
16 jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)
17 (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)); *Data Disc,*
18 *Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). Prior to trial, the
19 defendant may move to dismiss the complaint for lack of personal jurisdiction. *Data Disc,*
20 *Inc.* 557 F.2d at 1285; Fed. R. Civ. P. 12(b)(2). When the defendant moves to dismiss for
21 lack of personal jurisdiction, the plaintiff is "'obligated to come forward with facts, by
22 affidavit or otherwise, supporting personal jurisdiction.'" *Scott v. Breeland*, 792 F.2d 925,
23 927 (9th Cir. 1986) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787
24 (9th Cir. 1977)).

25 There is no statutory method for resolving the question of personal jurisdiction, so
26 "the mode of determination is left to the trial court." *Data Disc*, 557 F.2d at 1285 (citing
27 *Gibbs v. Buck*, 307 U.S. 66, 71-72 (1939)). Where a court determines that it will receive
28 motions and supporting affidavits to resolve the question of personal jurisdiction, the

1 plaintiff must “only make a *prima facie* showing of jurisdictional facts through the
 2 submitted materials in order to avoid a defendant’s motion to dismiss.” *Id.* In determining
 3 whether the plaintiff has met its burden, the “uncontroverted allegations in [the plaintiff’s]
 4 complaint must be taken as true, and conflicts between the facts contained in the parties’
 5 affidavits must be resolved in [the plaintiff’s] favor.” *Rio Props., Inc. v. Rio Intern.*
 6 *Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002) (citation omitted).

7 To establish jurisdiction over the defendant, the plaintiff must show that (1) the
 8 state’s long-arm statute confers personal jurisdiction over the defendant, and (2) the
 9 exercise of jurisdiction comports with constitutional principles of due process. *Id.*; *Omeluk*
 10 *v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir. 1995). Under Arizona’s
 11 long-arm statute, the exercise of personal jurisdiction is allowed to the same extent as the
 12 United States Constitution. *See* Ariz. R. Civ. P. 4.2(a); *Cybersell v. Cybersell*, 130 F.3d
 13 414, 416 (9th Cir. 1997); *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1358 (Ariz. 1995)
 14 (stating that under Arizona Rule of Civil Procedure 4.2(a), “Arizona will exert personal
 15 jurisdiction over a nonresident litigant to the maximum extent allowed by the federal
 16 constitution”). A court in Arizona may exercise personal jurisdiction over a nonresident
 17 defendant when doing so comports with constitutional principles of due process. *Cybersell*,
 18 130 F.3d at 416.

19 Constitutional requirements of due process require that the nonresident defendant
 20 have certain “minimum contacts” with the forum state such that the suit does not offend
 21 “traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326
 22 U.S. 310, 316 (1945); (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *see also Data*
 23 *Disc*, 557 F.2d at 1287. A court may assert general or specific jurisdiction over the
 24 nonresident defendant. *Cybersell*, 130 F.3d at 416. General jurisdiction exists where the
 25 nonresident defendant’s activities within a state are “substantial” or “continuous and
 26 systematic.” *Data Disc*, 557 F.2d at 1287.¹ A court may exercise specific jurisdiction where
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28 ¹ The facts set forth do not support a finding that this Court has general jurisdiction over
 Defendant, nor does Plaintiff so argue.

1 the defendant's specific contacts have a substantial connection and give rise to the claim
2 in question. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (1984).

3 Here, Mr. Erskine contends that the Court has specific jurisdiction over Mr. Fenn.
4 Whether this Court may exercise specific jurisdiction turns on the extent of the defendant's
5 contact with the forum and the degree to which the plaintiff's suit is related to the
6 defendant's contacts. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433
7 F.3d 1199, 1210 (9th Cir. 2006). The Ninth Circuit Court of Appeals uses the following
8 approach to determine whether the court may exercise specific jurisdiction over a
9 nonresident defendant: (1) the nonresident defendant must do some act in or consummate
10 some transaction with the forum, or perform some act by which it purposefully avails itself
11 of the privilege of conducting activities in the forum, thereby invoking the benefits and
12 protections of its laws; (2) the claim must be one which arises out of or results from the
13 defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable.

14 *Data Disc*, 557 F.2d at 1287.

15 The plaintiff bears the burden of establishing the first two requirements of the test.
16 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). If the
17 plaintiff establishes the first two requirements, the burden shifts to the defendant to
18 establish the third requirement is not met. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647
19 F.3d 1218, 1228 (9th Cir. 2011) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462,
20 476-78 (1985)). All three requirements must be met for the exercise of jurisdiction to
21 comport with constitutional principles of due process. *Omeluk*, 52 F.3d at 270.

22 III. ANALYSIS

23 As a preliminary matter, the Court grants Defendant's Motion to Substitute Party
24 (Doc. 36), requesting that Ms. Old, in her capacity as the Personal Representative of
25 Mr. Fenn's Estate, be substituted for the deceased Mr. Fenn. Plaintiff filed a response,
26 objecting to Defendant's request, but that objection is without merit. Therefore,
27 Defendant's motion is granted, and Ms. Old will defend Mr. Fenn's estate in this action
28 going forward.

1 **A. Lack of Personal Jurisdiction**

2 Defendant contends that Plaintiff failed to satisfy the first two prongs of the Ninth
3 Circuit's test for specific jurisdiction and that an exercise of jurisdiction over Defendant in
4 Arizona would be unreasonable. (MTD at 6-10.) While Mr. Fenn's death affects the
5 Court's analysis of the reasonableness of specific jurisdiction over the Defendant, the Court
6 need not discuss this prong because Plaintiff has not established either of the first two
7 prongs of the test.

8 To meet the first prong of the Ninth Circuit's three part test – that the defendant
9 purposefully directed activities at the forum state – the plaintiff must show the defendant
10 “either (1) ‘purposefully availed’ himself of the privilege of conducting activities in the
11 forum, or (2) ‘purposefully directed’ his activities towards the forum.” *Pebble Beach Co.*
12 *v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (quoting *Schwarzenegger*, 374 F.3d at 802).
13 The purposeful availment test is typically used in breach of contract suits, the subject matter
14 at issue here. *Schwarzenegger*, 374 F.3d at 802.

15 A showing that a defendant purposefully availed himself of the privilege of doing
16 business in a forum state typically involves evidence of the defendant's actions in the
17 forum, such as executing or performing a contract there. By taking such actions, a
18 defendant “purposefully avails itself of the privilege of conducting activities within the
19 forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*,
20 357 U.S. 235, 253, (1958). In return for these “benefits and protections,” a defendant
21 must—as a quid pro quo—“submit to the burdens of litigation in that forum.” *Burger King*,
22 471 U.S. at 476.

23 Here, Defendant did not have sufficient minimum contacts with Arizona to warrant
24 the Court's exercise of specific personal jurisdiction. Plaintiff argues that Defendant's
25 acceptance of the *True West* award in Arizona in 2014 establishes the minimum contacts
26 necessary for specific jurisdiction because Defendant accepted the award in order to give
27 the Chest and his Memoir more publicity. The allegations in Plaintiff's Complaint do not
28 support this assertion. Plaintiff even acknowledges that Defendant was nominated and

1 received the award “in recognition … for this contribution and preservation of America’s
 2 Western heritage.” Defendant asserts, and Plaintiff does not contest, that he did not in any
 3 way solicit the award. (Resp. Ex. 1 ¶ 11.) The mere acceptance of an award is not equivalent
 4 to a promotional book tour.

5 Besides Defendant’s acceptance of the award, Plaintiff alleges no additional facts
 6 that connect Defendant to Arizona. Indeed, Plaintiff alleges that the treasure was hidden in
 7 Colorado and does not allege that the Memoir’s publication or distribution invoked the
 8 benefits and protections of Arizona law in any manner. While Plaintiff alleges that he
 9 worked on solving the Memoir while living in Arizona, this does not bear on Defendant’s
 10 connections to the state. In sum, Defendant’s one-day trip to Arizona in 2014 does not
 11 satisfy the first prong of the test for specific personal jurisdiction.

12 Even if Defendant’s one-day visit to Arizona was sufficient to establish minimum
 13 contacts with the State, Plaintiff fails the second prong of the test because his breach of
 14 contract claim does not arise out of or result from his reception of the award in Arizona.
 15 Plaintiff’s entire argument for breach of contract is centered around the allegation that the
 16 Chest was not located where the Memoir indicated that it would be located. This injury is
 17 in no way connected to Defendant’s acceptance of the award in 2014. Plaintiff also does
 18 not allege that he learned of the Chest through Defendant’s acceptance of the award in
 19 Arizona. Rather, Plaintiff acknowledges that he learned of the Memoir while he was in
 20 Cambodia in 2016. Because there is no connection between Defendant’s contacts with
 21 Arizona and the alleged injury that Plaintiff has suffered, Plaintiff fails the second prong
 22 for specific personal jurisdiction.

23 **B. Plaintiff’s Request to Transfer Jurisdictions**

24 Plaintiff requests in his Response that if the Court dismisses his Complaint for lack
 25 of personal jurisdiction, it transfer the case under 28 U.S.C. § 1631 to the District of New
 26 Mexico where the Court would have general jurisdiction based on Defendant’s residence.
 27 The Court will deny Plaintiff’s request. Section 1631 provides that: “Whenever a civil
 28 action is filed in a court... and that court finds that there is a want of jurisdiction, the court

1 shall, if it is in the interest of justice, transfer such action... to any other such court... in
2 which the action... could have been brought at the time it was filed..." Plaintiff has not
3 shown that transferring the case to the District of New Mexico would be "in the interest of
4 justice." The statute of limitations on Plaintiff's breach of contract claim will not have
5 expired at the time of this case's dismissal, meaning Plaintiff can re-file in a different
6 jurisdiction and will thus not be prejudiced if the Court does not transfer the case.

7 Furthermore, transfer of the case does not serve the interests of justice "where the
8 plaintiff fails to make *prima facie* showing of a right to relief." *Clark v. Busey*, 959 F.2d.
9 808, 812 (9th Cir. 1992). Here, Plaintiff's Complaint does not state a claim. Plaintiff alleges
10 that the poem in Defendant's Memoir was a unilateral contract that Plaintiff performed by
11 following the clues to a location deemed by Plaintiff to be correct. Importantly, Plaintiff
12 does not allege that he physically located the Chest at this site or ever possessed it in any
13 manner. The Court has serious doubts as to whether the poem is in fact a unilateral contract.
14 Regardless, there is nothing in the poem's contents that would indicate that simply
15 "solving" the poem's clues would in turn entitle a person to the Chest. Rather, the poem's
16 fourth stanza states "Just take the chest and go in peace," making it clear that any claim to
17 the Chest's contents will be based on actual physical possession of the Chest. Under both
18 Arizona as well as New Mexico state law, unambiguous contracts are interpreted as written.
19 *Hadley v. Sw. Props., Inc.*, 570 P.2d 190, 193 (1977); *Richardson v. Farmers Ins. Co.*, 811
20 P.2d 571, 572, 112 N.M. 73, 74 (1991). Plaintiff allegedly following the clues to arrive at
21 the "correct" location thus does not entitle him to treasure or any other type of damages.
22 Courts have very limited resources and it would not serve the interests of justice to obligate
23 the District Court of New Mexico to spend time on this case where Plaintiff has failed to
24 allege facts that state a plausible claim for breach of contract. Plaintiff's request to transfer
25 the case to the District of New Mexico is denied.

26 Plaintiff also filed a separate Motion to Transfer, which expanded on the arguments
27 made in his Response. While the Court took Plaintiff's additional arguments into
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1 consideration when reaching its decision, it will deny Plaintiff's motion as moot because it
2 is duplicative of the request in his Response.

3 **C. Plaintiff's Motion to Supplement the Complaint**

4 The Court will deny Plaintiff's motion to supplement the pleadings under Fed. R.
5 Civ. P 15(d) because any supplemental filing would be futile. Plaintiff's motion requests
6 leave to file a supplemental pleading based on "new events" that have taken place since the
7 filing of his initial Complaint. (Doc. 22 at 3.) None of the new events relate in any way to
8 the Court's finding that it lacks personal jurisdiction over the Defendant; nor do they
9 bolster Plaintiff's claims for breach of contract. The supplemental pleading would be futile,
10 and Plaintiff's motion is denied.

11 **D. Remaining Motions Denied as Moot**

12 Because the Court has granted Defendant's Motion to Dismiss as well as
13 Defendant's Motion to Substitute Party, Defendant's Motion to Strike and Plaintiff's
14 Motion to Appoint a New Party in Place of Defendant are denied as moot.

15 **E. Attorney's Fees**

16 Pursuant to A.R.S. § 12-341.01, Defendant requests its attorneys' fees and costs in
17 defending this action. The Court agrees that Defendant is entitled to seek reasonable
18 attorneys' fees and costs and may submit an application for fees and costs that complies
19 with the applicable rules.

20 **IT IS THEREFORE ORDERED** granting Defendant's Motion to Dismiss
21 (Doc. 15) and dismissing this matter with prejudice for lack of personal jurisdiction.

22 **IT IS FURTHER ORDERED** denying Plaintiff's Motion to Supplement the
23 Original Complaint (Doc. 22).

24 **IT IS FURTHER ORDERED** denying Plaintiff's Motion to Transfer Jurisdiction
25 as moot (Doc. 29).

26 **IT IS FURTHER ORDERED** denying Defendant's Motion to Strike as moot
27 (Doc. 32).

IT IS FURTHER ORDERED granting Defendant's Motion to Substitute Party (Doc. 36).

IT IS FURTHER ORDERED denying Plaintiff's Motion to Appoint a New Party in Place of Defendant as moot (Doc. 39).

IT IS FURTHER ORDERED that Defendant shall file any application for fees within 14 days of the date of this order.

Dated this 1st day of February, 2021.

Honorable John J. Tuchi
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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9 Brian Erskine,

No. CV-20-08123-PCT-JJT

10 Plaintiff,

ORDER

11 v.

12 Forrest Fenn,

13 Defendant.

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15 At issue is Defendant's Motion for Clarification (Doc. 47). On February 1, 2021,
16 the Court entered an Order dismissing this case for lack of personal jurisdiction (Doc. 46).
17 The Court additionally declined Plaintiff's request to transfer the case to the District of
18 New Mexico under 28 U.S.C. § 1631 because, among other reasons, “[t]he statute of
19 limitations on Plaintiff's breach of contract claim will not have expired at the time of this
20 case's dismissal, meaning Plaintiff can re-file in a different jurisdiction and will thus not
21 be prejudiced if the Court does not transfer the case.” (Doc. 46 at 8.) However, later in the
22 Order, the Court stated it would dismiss the case “with prejudice.” (Doc. 46 at 9.)
23 Defendant's Motion for Clarification correctly asserts that these portions of the Order are
24 in conflict. The Court will thus clarify its previous Order here.

25 Plaintiff's case is dismissed without prejudice. A dismissal in this or any other
26 jurisdiction based on a lack of personal jurisdiction in that district does not, without more,
27 preclude a claim properly brought in a district where personal jurisdiction requirements
28 may be met.

1 Lastly, this Order will grant Defendant's request that pursuant to Fed. R. Civ. P.
2 58(a), the Court enter judgment of dismissal against Plaintiff in a separate document after
3 any attorney fee motion is addressed or the time to file the same has passed without
4 Defendant filing a motion.

5 **IT IS THEREFORE ORDERED** granting Defendant's Motion for Clarification
6 (Doc. 47). The Court dismissed the matter without prejudice.

7 Dated this 5th day of February, 2021.

Honorable John J. Tuchi
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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9 Brian Erskine,

No. CV-20-08123-PCT-JJT

10 Plaintiff,

ORDER

11 v.

12 Forrest Fenn,

13 Defendant.

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15 Defendant, the Estate of Forrest Burke Fenn, through personal representative Zoe
16 Fenn Old, filed a Motion for Award of Attorneys' Fees (Doc. 49) to which Plaintiff filed a
17 Response in opposition (Doc. 51); Defendant then filed a Reply (Doc. 53). No party
18 requested oral argument on the matter and the Court concludes such a hearing would not
19 assist in resolution of the Motion. See LRCiv 7.2(f). The operative facts of this matter are
20 well chronicled in the Court's earlier Order granting Defendant's Motion to Dismiss
21 (Doc. 46) and it therefore will not repeat them here.

22 A.R.S. § 12-341.01(A) provides in relevant part that "[i]n any contested action
23 arising out of a contract, express or implied, the court may award the successful party
24 reasonable attorneys' fees." This matter arose out of contract. Plaintiff alleged that
25 Defendant's conduct created a "unilateral" contract, and the cornerstone of his claim was
26 an alleged breach of that contract. And there is no doubt Defendant was the successful
27 party. The Court granted Defendant's Motion for dismissal of the matter in full for lack of
28 jurisdiction. (Doc. 46.) For a defendant there can be no greater success than full dismissal.

1 To the extent Plaintiff argues that because the Court dismissed on jurisdictional grounds
2 rather than on the merits of the contract question, Defendant was not the “successful party,”
3 the Court rejects that argument soundly. Defendant won. The case is over. He—now his
4 estate—is the “successful party” in “a contested action arising out of contract” for purposes
5 of Section 12-341.01. *See, e.g., Balestrieri v. Balestrieri*, 232 Ariz. 25, 28 (App. 2013);
6 *Britt v. Steffen*, 220 Ariz. 265, 267 (App. 2008). Defendant is thus eligible for reasonable
7 attorneys’ fees under the statute.

8 Having determined Defendant’s eligibility for a fee award, the Court applies the
9 following factors to determine whether Defendant also is entitled to such fee: 1) the merits
10 of the claim presented by the unsuccessful party; 2) whether the litigation could have been
11 avoided or settled and thus the successful party’s efforts were completely superfluous in
12 achieving the result; 3) whether assessing fees against the unsuccessful party would cause
13 an extreme hardship; 4) whether the successful party did not prevail with respect to all of
14 the relief sought; 5) the novelty of the legal question presented; 6) whether such claim
15 previously had been adjudicated in the jurisdiction; and 7) whether the award would
16 discourage other parties with tenable claims from litigating or defending legitimate contract
17 issues for fear of incurring liability for substantial amounts of attorneys’ fees. *Associated*
18 *Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (Ariz. 1985).

19 These factors favor the award sought. As the Court determined in its dismissal
20 Order, Plaintiff failed to demonstrate the Court had personal jurisdiction over Defendant,
21 finding that general jurisdiction was “plainly absent” and specific jurisdiction has “clearly
22 not been met.” (Doc. 15 at 6, 8.) Plaintiff’s threshold claim of personal jurisdiction thus
23 had no merit. It also is clear from the parties’ filings that the litigation could not have been
24 avoided, and thus defense counsel’s efforts were necessary to resolve this matter, as
25 Plaintiff rebuffed Defendant’s documented efforts to otherwise resolve the matter and
26 Plaintiff subsequently took extreme positions once he instituted the action. And Plaintiff
27 has not addressed in his Response, and therefore has failed to meet his burden to show,
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1 whether an award of fees would cause an extreme hardship for him. *See Woensdregt v.*
2 *Handyman Connection*, 2019 WL 4316556 (Ariz. App. Ct. Sept. 12, 2019).

3 Defendant prevailed with respect to all relief sought—he achieved dismissal of the
4 action. The legal question presented to the Court was not novel and is regularly adjudicated
5 in the state and District of Arizona. Finally, the Court finds easily that an award of fees
6 here would not discourage other parties with tenable claims from litigating legitimate
7 contract issues for fear of incurring attorney fee liability, the operative words here being
8 *tenable* and *legitimate*. Thus, the Court concludes Defendant is entitled to an award of
9 attorneys' fees in this matter.

10 Finally, the Court concludes what amount of fees is reasonable as an award.
11 Defendant has complied with LRCiv 54.2 by providing briefing and supporting
12 documentation to allow the Court to evaluate the reasonableness of the fee award. In
13 determining what award is reasonable, the Court must consider factors including: 1) the
14 time and labor required of counsel; 2) the novelty and difficulty of questions presented; 3)
15 the skill requisite to perform the legal service properly; 4) preclusion of other employment
16 by counsel because of accepting this action; 5) the customary fee charged in matters of the
17 type involved; 6) whether the fee is fixed or contingent; 7) any time limitations imposed
18 by the client or circumstances; 8) the amount of money involved and results obtained; 9)
19 the experience, reputation and ability of counsel; 10) the “undesirability” of the case; 11)
20 the nature and length of the professional relationship between counsel and client; 12)
21 awards in similar actions; and 13) other matters deemed appropriate under the
22 circumstances. LRCiv 54.2(c)(3).

23 The Court finds the amount of time and labor required by counsel to complete the
24 tasks before it ultimately was reasonable. Ordinarily, the Court would question how
25 attorneys' fees of nearly \$100,000 would be justified in defending a matter that was
26 dismissed on a Rule 12(b) motion before discovery commenced on the sole issue of
27 personal jurisdiction—which, as set forth *supra* and considered again here as a
28 reasonableness factor, is not novel and has been decided by courts of this state and District

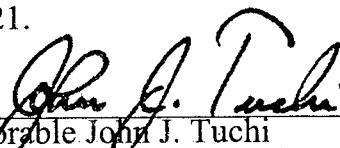
1 many times. But a review of the docket, the filings contained in it and the itemized billing
2 statement reveals that due to the volume, aggressiveness and at times inscrutability of
3 Plaintiff's filings, significant additional time was required of defense counsel. Next, the
4 factor discussing preclusion of other work as a result of accepting this matter is largely
5 neutral here, as the matter did not consume an inordinate amount of time for any counsel
6 involved, though at times would have precluded acceptance of new work of an urgent
7 nature. Similarly, the time limitations imposed by the matter were routine in that in every
8 litigation, counsel must adhere to court deadlines for pleading and motion practice.

9 With respect to customary fees charged for a matter of this type, the Court finds that
10 the hourly rates charged by the three attorneys representing Defendant in this matter are
11 reasonable in light of: 1) the market in which counsel practice, respectively; 2) the area and
12 level of practice in which they engage; 3) the skill requisite to perform the legal services
13 required here properly and 4) the experience, reputation and ability of counsel—these last
14 two characteristics being factors the Court must independently consider here under Rule
15 54.2. Moreover, Plaintiff does not challenge the hourly rates established by the respective
16 fee agreements. The fee agreements provided for, and the billing statements reflect, billing
17 at an hourly rate rather than a fixed fee or on a contingency basis, which shifts the risk to
18 the client and therefore does not in and of itself justify a higher fee to compensate for risk
19 assumed by counsel. The results obtained in the matter for Defendant—full dismissal
20 before having to engage in discovery, dispositive motion practice and trial—militate
21 toward the fee being reasonable. There was nothing “undesirable” about this matter
22 justifying a higher fee, and the length of relationship between any counsel and their client
23 is neutral in this evaluation. An award of the amount requested here is consistent with other
24 awards in similar matters involving the level of litigiousness observed.

25 Upon evaluation of these factors, the Court concludes the requested award of
26 \$98,891.12 in attorneys' fees is reasonable and will award same to Defendant. The Court
27 also will award Defendant \$1,100.12 in costs, which comply with the rules' requirements.
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1 **IT IS ORDERED** granting Defendant's Motion for Award of Attorneys' Fees
2 (Doc. 49.) Defendant is awarded \$98,891.12 in fees and \$1,100.12 in costs.

3 Dated this 1st day of December, 2021.

4 
5 Honorable John J. Tuchi
6 United States District Judge

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FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN 27 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIAN ERSKINE,

Plaintiff-Appellant,

v.

FORREST FENN; ZOE FENN OLD, in her capacity as the Personal Representative of the Estate of Forrest Burke Fenn,

Defendants-Appellees.

No. 21-15373

D.C. No. 3:20-cv-08123-JJT

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John Joseph Tuchi, District Judge, Presiding

Submitted January 19, 2022**

Before: SILVERMAN, CLIFTON, and HURWITZ, Circuit Judges.

Brian Erskine appeals pro se from the district court's judgment dismissing for lack of personal jurisdiction his diversity action alleging breach of contract and denying his request to transfer the action to the District of New Mexico under 28

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

U.S.C. § 1631. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (district court's dismissal of a complaint without leave to amend); *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (district court's refusal to transfer a case under 28 U.S.C. § 1631). We affirm.

In his opening brief, Erskine fails to address the district court's dismissal on the basis of personal jurisdiction, and he has therefore waived his challenge to the district court's order on this issue. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993) (issues not supported by argument in pro se appellant's opening brief are waived).

The district court did not abuse its discretion by dismissing Erskine's complaint without leave to amend because it was clear that amendment could not cure the lack of personal jurisdiction. *See Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007) ("Dismissal of a pro se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.").

The district court did not abuse its discretion by declining, in the interest of justice, to transfer the action to the District of New Mexico. *See* 28 U.S.C. § 1631;

Clark v. Busey, 959 F.2d 808, 813 (9th Cir. 1992) (affirming district court's refusal to transfer case that failed to state a colorable claim); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 591 (9th Cir. 1983) (determining that transfer of action was "not necessary to advance the interests of justice" because appellants could refile within the statute of limitations).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Appellees' motion for judicial notice (Docket Entry No. 12) is granted. All other pending requests are denied.

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 19 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIAN ERSKINE,

Plaintiff-Appellant,

v.

FORREST FENN; ZOE FENN OLD, in her capacity as the Personal Representative of the Estate of Forrest Burke Fenn,

Defendants-Appellees.

No. 21-15373

D.C. No. 3:20-cv-08123-JJT
District of Arizona,
Prescott

ORDER

Before: SILVERMAN, CLIFTON, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Erskine's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 24) are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 6 2022

MOLLY C. DWYER, CLERK
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ORDER

Before: SILVERMAN, CLIFTON, and HURWITZ, Circuit Judges.

Erskine's opposed motion to stay the issuance of the mandate (Docket Entry No. 28) is denied. *See* Fed. R. App. P. 41(d); 9th Cir. R. 41-1. The mandate will issue in due course.

Appellees' unopposed motion for attorney's fees (Docket Entry No. 27) is granted. Appellees are entitled to attorney's fees on appeal. The determination of an appropriate amount of fees is referred to Appellate Commissioner Lisa B. Fitzgerald, who has authority to conduct whatever proceedings she deems appropriate and to enter an order awarding fees subject to reconsideration by the panel. *See* 9th Cir. R. 39-1.9.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 16 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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Defendants - Appellees.

No. 21-15373

D.C. No. 3:20-cv-08123-JJT
U.S. District Court for Arizona,
Prescott

MANDATE

The judgment of this Court, entered January 27, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

Costs are taxed against the appellant in the amount of \$54.90.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Quy Le
Deputy Clerk
Ninth Circuit Rule 27-7

D.ARIZ. DISTRICT COURT JUDGMENT PENDING

EXHIBIT: PRESS EXAMPLES AS SHOWING ALLEGED UNILATERAL CONTRACT IN POEM ENDING IN GOLD CLAUSE (NPR) AND IRREPARABLE HARM BY IMMINENT, LIKELY REPUTATIONAL HARM AS DETAILED HEREIN (*Santa Fe New Mexican*)

PODCAST NEWS
NPR News Talk
Now On Air Now
PLAYLIST



DONATE

CULTURE

Seeking Adventure And Gold? Crack This Poem And Head Outdoors

March 13, 2016 · 7:59 AM ET

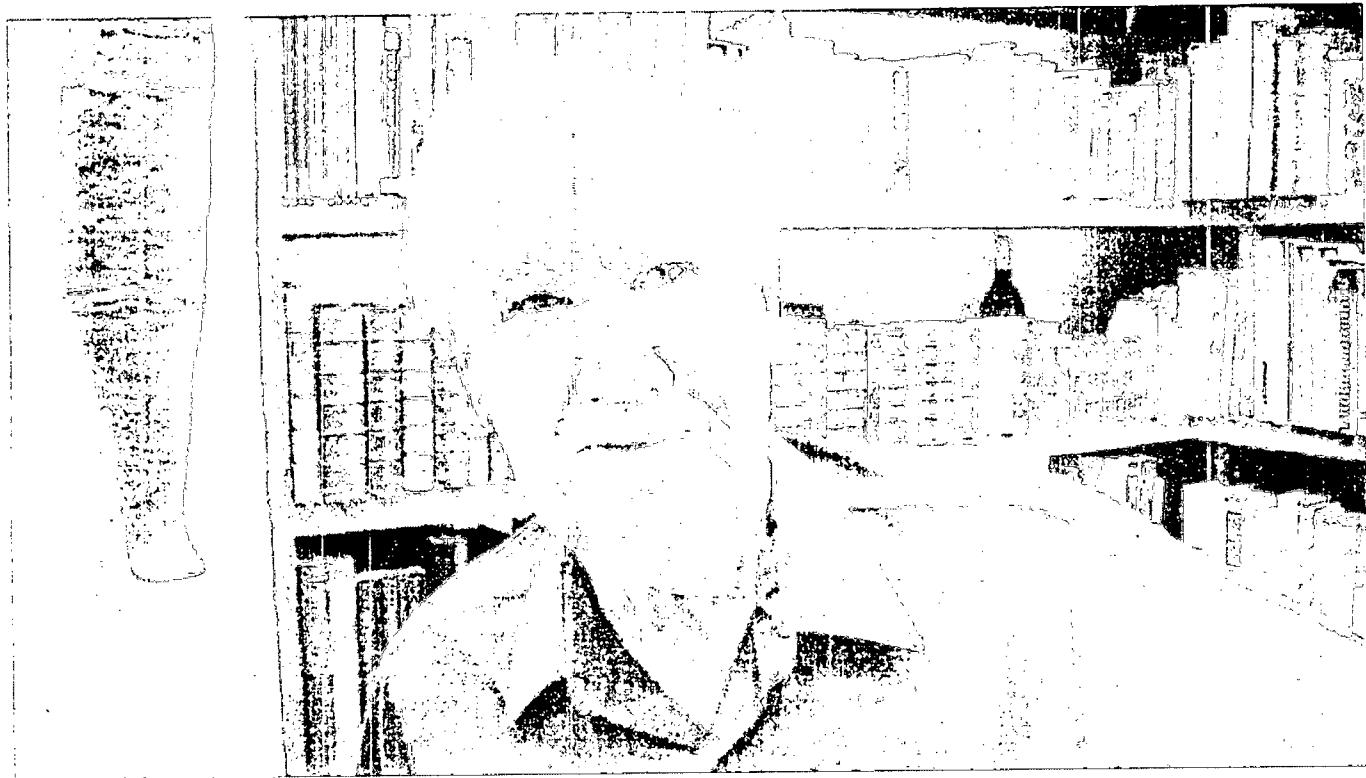
Heard on Weekend Edition Sunday



JOHN BURNETT

5-Minute Listen

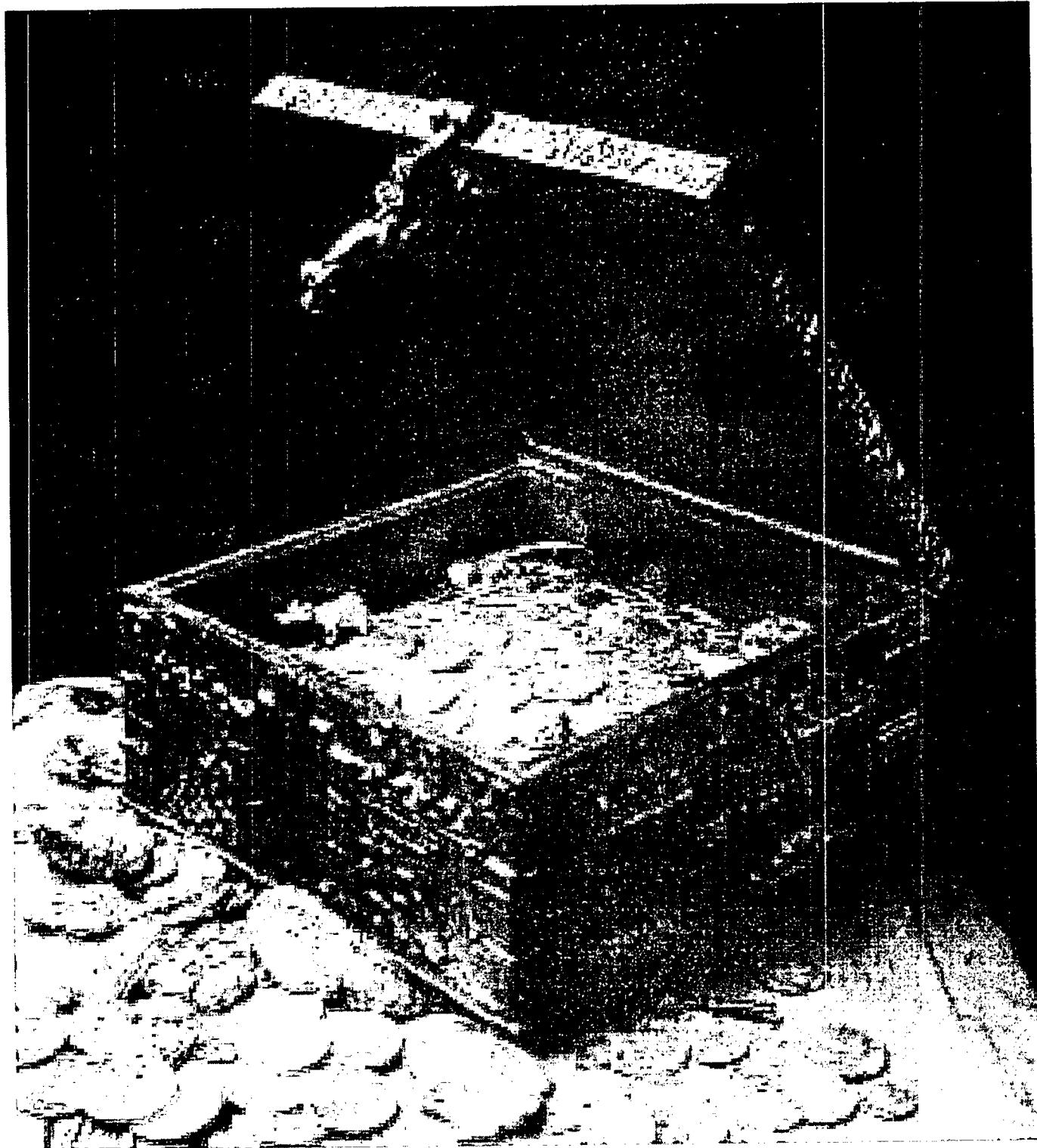
PLAYLIST [Download](#)
[Transcript](#)



Forrest Fenn is a millionaire who hid a treasure chest in the Rocky Mountains. Adventure seekers look for clues based on a poem he published in his book, *The Thrill of the Chase*, with hopes of claiming the million-dollar treasure.

John Burnett/NPR

Somewhere in the Rocky Mountains, there is a bronze chest filled with gold and precious gems. The search for this hidden treasure has become a hobby for some, an obsession for others, and for one recent searcher — a fatal pursuit.



Forrest Fenn's treasure is in an ornate, Romanesque box that might be filled with gold nuggets, gold coins and other gems.

Courtesy of Forrest Fenn

The man behind the treasure is Forrest Fenn, an 85-year-old millionaire, former Vietnam fighter pilot, self-taught archaeologist, and successful art dealer in Santa Fe, N.M.

"No one knows where that treasure chest is but me," Fenn says. "If I die tomorrow, the knowledge of that location goes in the coffin with me."

The ornate, Romanesque box is 10-by-10 inches and weighs about 40 pounds when loaded. Fenn has only revealed that it is hidden in the Rocky Mountains, somewhere between Santa Fe and the Canadian border at an elevation above 5,000 feet. It's not in a mine, a graveyard or near a structure. For further clues, you have to read the poem in his self-published book, *The Thrill of the Chase*.

Here is one stanza:

Begin it where warm waters halt

And take it in the canyon down,

Not far, but too far to walk.

Put in below the home of Brown.

"'Where warm waters halt,' no one agrees on what that means. Does that mean where two rivers converge? Does that mean where a hot spring pours into a river? Does that mean at the Continental Divide?" says Sacha Johnston, an avid searcher in Albuquerque. She runs a website that sells Fenn treasure tchotchkes.

Now, six years after publication of the poem, tens of thousands of people have reportedly gone looking for Fenn's treasure, thought to be worth well over a million dollars.

Cheer Folks Up And Go Outside

Fenn sits at his laptop in the study of his Santa Fe manse, his blue eyes twinkling mischievously. He reads emails all day from treasure hunters imploring him for further clues.

"That's the kind of email that I don't respond to," he says. "Because if you want me to give you a clue I'm not going to answer your email."

The Thrill of the Chase

From *Adventure and Gold*
by Mark Twain, 1869

And I have gone after a bear,
And made my tracks bold,
I have kept my shirt to my
And lost my coat and all.

Waded through brown leather hills
And left it in the sunrise down.
Waded far, far up, far up,
Till the hills were brown of brown.

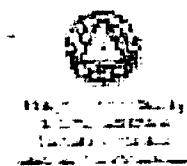
Then came the place for the search,
The road is very dreary and
There'll be no paddle up your track,
You bring hills and hills high.

If you see me now and find the traps,
Look gently down, your friend is trust,
With many scars with many gashes,
You take the traps and go on traps.

So softly in under; I can't see
And here at the traps, I see all round,
The bushes I shake up down,
I've done it twice, and now I'm round.

So hurry on all and hurry quick,
You off to hell do yourself quick,
If you are bent and ready to go,
I give you back to the gold.

5/9/22
13:21:40



The treasure map and poem from Fenn's book.

Benchmark Maps/Courtesy of Forrest Fenn

Surrounding him is his extraordinary collection of Native American artifacts such as Apache dolls, moccasin boots and buffalo skulls.

"I love antiques, particularly American Indian," he says.

In the 1990s, he was criticized by Southwestern archaeologists over his excavation of a Pueblo Indian site that he owned. They consider him a plunderer; Fenn thinks they're "clubby fussbudgets."

The war over Indian relics has largely subsided. Today, Fenn is all about the treasure. He says he hid the box in the midst of the Great Recession to cheer folks up and to get them off their couches and into the great outdoors.

"Sure, I'm eccentric," he says. "I pride myself on being eccentric. I don't want to go down the center line like a lot of people do."

The Missing Treasure Hunter ... And The Missing Treasure?

The hunt for the treasure can become an obsession.

Randy Bilyeu was a 54-year-old retired mechanic who had moved from Florida to Colorado to look for the bronze box full time. He was last seen alive on Jan. 5. His car, a raft, and his little dog were found near the Rio Grande south of Santa Fe.

Think you're good at cracking codes? Read Forrest Fenn's poem with clues to the treasure:

*As I have gone alone in there
And with my treasures bold,
I can keep my secret where,
And hint of riches new and old.*

*Begin it where warm waters halt
And take it in the canyon down,
Not far, but too far to walk.
Put in below the home of Brown.*

*From there it's no place for the meek,
The end is ever drawing nigh;
There'll be no paddle up your creek,
Just heavy loads and water high.*

*If you've been wise and found the blaze,
Look quickly down, your quest to cease,
But tarry scant with marvel gaze,
Just take the chest and go in peace.*

*So why is it that I must go
And leave my trove for all to seek?
The answers I already know,
I've done it tired, and now I'm weak.*

*So hear me all and listen good,
Your effort will be worth the cold.
If you are brave and in the wood
I give you title to the gold.*

Fenn is delighted the quest has motivated so many people to discover the Rocky Mountains, but he cautions: "We don't want to get anybody else lost. Be prepared. Take a GPS. Take at least one other person with you. And wait [until] the snow and the ice melts."

Is the treasure really worth risking your life over?

Doug Preston is a best-selling author and a longtime friend of Fenn's. He says he saw the chest in the walk-in vault in Fenn's house before he hid it, and Preston can attest that it was filled with gold nuggets, gold coins, pre-Columbian gold figures, rubies, sapphires, emeralds and diamonds.

"As far as proof goes [that he hid the treasure] there's no proof," Preston says. He also lives in Santa Fe. "It's hard to prove a negative. The negative is that the chest is gone. It's not in his house and it's not in his vault. And also knowing Forrest for as long as I have, I can absolutely say with 100 percent confidence that he would never pull off a hoax. I'm absolutely sure that he hid that treasure chest."

A noted New Mexico archaeologist contacted for this story says he, too, saw the treasure and he also believes Fenn is not a trickster.

The searchers read and re-read the cryptic poem and pore over topographic maps, waiting for the "aha" moment. Then they trek through aspen forests, explore riverbanks, and rappel down cliff sides looking for the treasure.

"You go out, you look, you don't find it, you come back home, you go through your clues again, your solves again and you think, 'Where did I go wrong?'" says Cynthia Meachum, a retired high-tech worker in Albuquerque who says she's been out at least 60 times looking for the treasure. "And you go out and you do it again. And I have actually seen some of the most spectacular scenery because of this that I ever would've seen."

And for that, Fenn would be pleased.

treasure hunt thrill of the chase forrest fenn rocky mountain treasure chest santa fe

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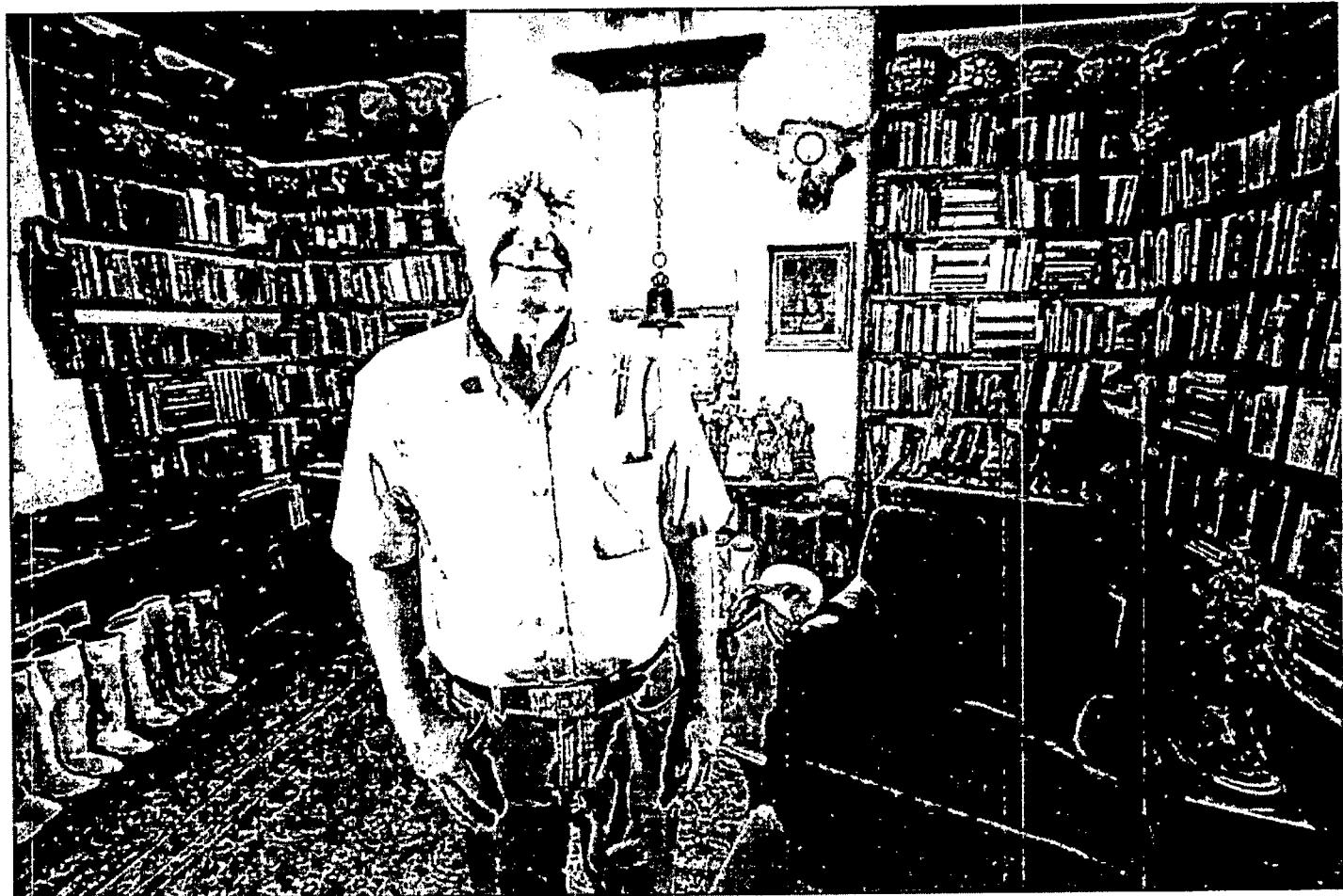
https://www.santafenewmexican.com/news/local_news/state-police-chief-to-fenn-stop-this-nonsense/article_81424a8c-6282-5590-ad92-5a2a966e4771.html

State Police chief to Fenn: 'Stop this nonsense'

From the Archives: Chasing Forrest Fenn's treasure series

By Andrew Oxford | The New Mexican

Jun 19, 2017



Forrest Fenn at his Santa Fe home in May 2015. Luis Sánchez Saturno/New Mexican file photo

The New Mexico State Police chief says Santa Fe author Forrest Fenn should get his chest of gold, jewels and other artifacts from wherever he hid it in the wild and put an end to a treasure hunt that led to a man's death near Taos earlier this month.

"I would implore that he stop this nonsense," Chief Pete Kassetas said after crews retrieved a body from the Río Grande over the weekend that investigators suspect is that of Colorado pastor Paris Wallace.

Wallace's disappearance while searching for Fenn's treasure is just the latest alarming episode in the hunt for a bounty that Fenn said in a 2010 memoir he stashed somewhere in the Rocky Mountains north of Santa Fe. Another searcher died on the Río Grande last year looking for the chest, others have gotten lost and one man stalked Fenn's granddaughter suspecting the treasure was really a metaphor for her. Each such incident has raised the question of whether the quest to solve Fenn's riddle has gone too far.

Describing Wallace's disappearance as tragic, Fenn said Monday he has been thinking in recent days about how to make the search safer or whether to cancel it altogether, but had not decided either way.

"The several hundred emails I have received today are overwhelming against stopping the search ...," he wrote in an email to *The New Mexican*. "My mind is open to finding a solution, but no decision has been made."

Many in what has grown into a community of people searching for Fenn's treasure chest argue he never intended it to be a dangerous physical challenge.

Dal Neitzel, a Washington state resident who has a website devoted to the treasure hunt, said "the grand majority of people are in it for the fun."

"We've seen people who have met their spouses while out searching for the treasure, brothers who haven't spoken to one another in 30 years reunited, single moms who take their kids out and bond with them in ways they never had," he said.

In that sense, Neitzel argues, Fenn has succeeded in what he has said is his real goal: getting people into the outdoors to discover the natural jewels of the America West.

Searchers who have fallen into harm's way looking for Fenn's treasure have not followed Fenn's own clues, said David Rice, a co-founder of an annual "Fennboree" gathering of searchers.

But the tragedies have hit Fenn, 86, and the community of treasure seekers hard. Rice said the death of a treasure hunter last year struck Fenn "like a physical blow."

Fenn on Monday described the apparent death of Wallace as "a terrible loss."

"Words cannot adequately express the depth of my feelings," he wrote.

Fenn has urged caution, discouraging searchers from venturing into dangerous areas or going out to look for the treasure by themselves.

"Regardless of where you think the treasure is you should not exceed your physical and mental capabilities," Fenn told Denver newspaper *Westword* on Monday. "The treasure is not in a dangerous place. They should remember that I was about 80 when I hid it."

The search for a bronze chest filled with valuables, which Fenn described in his 2010 book *The Thrill of the Chase*, has become a legacy for the Santa Fe character, decorated Vietnam War fighter pilot, art dealer and amateur archaeologist.

National television news programs featured Fenn's treasure hunt and a community sprouted up in online forums and on blogs to pick apart each clue.

Fenn has reveled in the stories of adventure and shear outdoors.

The treasure is not necessarily in New Mexico. Many believe it could be in Colorado, Wyoming or Montana. But the Land of Enchantment has drawn plenty of searchers. Even the state tourism department has touted the treasure hunt, producing a video in 2015 that features sweeping shots of the New Mexico landscape and Fenn discussing his storied life as well as the treasure.

"Certainly, we want people to get outdoors and enjoy New Mexico," Kassetas said, "but you have to do it safely."

The state police chief said the treasure hunt had not only led to the deaths of two men in New Mexico. Missions to find wayward treasure hunters have put the lives of law enforcement officers as well as search and rescue volunteers at risk while straining state resources, he said.

"I think [Fenn] has an obligation to retrieve his treasure if it does exist," Kassetas said.

Even if Fenn and other searchers urge caution, Kassetas said it was inevitable that some would put themselves in danger for the payoff of more than \$1 million in treasure.

One searcher, Randy Bilyeu of Colorado, died after trying to navigate the frigid Rio Grande in a small, inflatable raft. He disappeared in January 2016, and his remains were discovered in July. His wife said she did not believe Fenn had hidden a treasure and called on him to put a stop to the hunt.

Fenn has landed in danger, too.

A Nevada man claimed the treasure was really a metaphor for Fenn's granddaughter and stalked her.

Earlier this year, Fenn sought a restraining order against a Texas man who had visited his home uninvited, took photos and said he would return.

It was unclear if the man was seeking Fenn's treasure. But in requesting the restraining order, Fenn wrote: "I fear harm to myself and my family. We fear kidnapping or worse."

News of Wallace's disappearance came only a few days after this year's Fennboree, which organizers say brought more than 100 treasure hunters to the Santa Fe National Forest to meet Fenn, trade stories and advice, and brag.

Organizers said they do not believe Wallace, 52, attended the event.

The lead pastor at Connection Church in Grand Junction, Colo., since 2005, Wallace appears to have disappeared near Taos. State police say his truck was found near the Taos Junction Bridge and that officers found a recent receipt inside for rope as well as other equipment.

Authorities retrieved a body downstream in the Rio Grande near Pilar over the weekend but state police have not confirmed whether it is Wallace.

Contact Andrew Oxford at 505-986-3093 or aoxford@sfnewmexican.com. Follow him on Twitter at @andrewboxford.

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In this Series

Archives: Chasing Forrest Fenn's treasure

Updated Jul 14, 2021 article

https://www.santafenewmexican.com/life/features/forrest-fenn-strengthens-resolve-as-controversy-over-hidden-treasure-grows/article_b13e3993-8fd4-563c-a2f2-58a799eca24c.html

Forrest Fenn strengthens resolve as controversy over hidden treasure grows

From the Archives: Chasing Forrest Fenn's treasure series

By Bruce Krasnow | The New Mexican

Jun 24, 2017



Forrest Fenn spends part of Tuesday afternoon at his home reading emails from people telling him to keep the treasure hunt. Fenn also received a handful emails from people telling him to stop the hunt. Luis Sánchez Saturno/The New Mexican

Seven years after Santa Fe author and artifacts dealer Forrest Fenn wrote a poem that he claims describes the location of a hidden chest with gold coins and jewelry, his eyes still light up when he reads about those who are challenging his wit to find the trove.

As his hearing begins to fade, Fenn's connections with searchers is largely a laptop computer that opens his world to hundreds of messages a day from national reporters, searchers and now those calling on him to stop a misadventure after a second Colorado man who came to New Mexico to hunt for the gold was found dead.

Despite a plea last week from the top police commander in the state of New Mexico to call off the hunt, Fenn is indicating he will not do so.

Even if Fenn wanted to stop people from following clues published in a poem at the end of his memoir, *The Thrill of the Chase*, there is no way to make that happen. No one dedicated to the hunt would listen, he said, unless he retrieved the treasure himself and posted a photo of the gold on the internet, all covered in mud from the wilderness where it is hidden.

"I have no intention of getting the treasure chest," Fenn told *The New Mexican*.

A former military pilot who went to survival school in the Philippines, Fenn turns 87 in August. He has doubts about his own physical ability to retrieve the chest. In addition to his hearing issues, Fenn has a bad back and tires more easily than when he stashed the money and artifacts in 2010, after a bout with cancer.

The chest itself weighs 20 pounds and its contents another 22. When he deposited the cache, Fenn said, he made two separate trips, and he went by himself.

Now, he said, "I don't know I could physically get it. I'm not as agile as I once was. ... When I walk 50 yards, I have to sit down."

Longtime Fenn supporter Dal Neitzel, a Seattle videographer who maintains a website devoted to the search and sells Fenn books and search paraphernalia, said those who think Fenn will suspend the search don't understand him.

"I don't think people understand the strength of his resolve," Neitzel said. "I do not believe he will [end the search] for this or anything else."

Neitzel was referring to the recent death of Paris Wallace, 52, a pastor from Grand Junction, Colo., who was searching for Fenn's treasure. Wallace apparently died along the Rio Grande near Taos. His body was found June 18 near Pilar, seven miles downstream from the Taos Junction Bridge, where his car was parked.

His death came 18 months after the death of Randy Bilyeu, 54, of Broomfield, Colo., who went missing after dropping an inflatable raft on the chilly Rio Grande in January 2016. State police and volunteer searchers spent weeks combing the banks of the river, and Fenn himself rented a helicopter to help find the man.

Bilyeu's remains were found near the river just north of Cochiti Lake in July 2016.

Since publication of his autobiography, Fenn has said he wrote the *The Thrill of the Chase* as inspiration for those seeking a purpose-filled life, and that requires engaging with others and experiencing the outdoors, especially coming to the Rocky Mountain West, a region he has hiked, fished and explored since childhood.

The search for Fenn's treasure has spawned an annual Fennboree gathering of campers at Hyde Memorial State Park, as well as two documentary films and hundreds of newspaper and magazine articles. The New Mexico Department of Tourism also has produced a video about the search and posted it on a state website.

There's no doubt that Fenn's book and its publicity has boosted tourism in New Mexico.

Santa Fe Mayor Javier Gonzales proclaimed May 25, 2015, as Thrill of the Chase Day, in recognition of "visitors who have traveled from all over the world to Santa Fe and its surrounding areas for the purpose of searching for the treasure that Forrest Fenn has hidden ... increasing the prosperity of its lodging and service-related businesses."

New Mexico State Police Chief Pete Kassetas recognizes the benefits of Fenn's search for New Mexico. But after Wallace's death, he asked Fenn to stop it. Unlike other accidents in the wilderness, one person has control over whether anyone else dies while looking for the treasure — and that person is Fenn.

Kassetas called Fenn on the phone Thursday while he was being filmed by a crew from *Good Morning America*, which has covered the search extensively and has interviewed Fenn at his Santa Fe home.

"You had talked about giving more clues, providing more clues, to help people better find your treasure," Kassetas said to Fenn during the show. "Again, I call for you to pull it."

Fenn refused, but said he would again warn hunters to be safe when they go into the wilderness. "I'm not going to give a clue to help people find the treasure. I'm going to give a clue to try to keep them out of trouble — to make them safer," he replied in the televised exchange.

Kassetas told *The New Mexican* on Friday that he wants to meet with Fenn to go over some safety precautions that Fenn could pass on to others. "We would talk about ways to better prepare searchers that are going out into mountains and rivers to look for this. ... I think he can be more descriptive where the treasure may not be — if it does exist — so people can ignore those pitfalls."

Fenn has said the Rio Grande is not part of the Rocky Mountains, so searchers should not be taking risks to look there. He also has said that the chest is not hidden in a dangerous place.

And Fenn has cautioned searchers against trespassing on private or tribal land and cemeteries, saying the treasure is not hidden there.

Bilyeu's ex-wife, Linda Bilyeu, has been among Fenn's most vocal critics and reiterated her call last week for the search to stop.

"Another family is left to grieve and carry on without their loved ones," Bilyeu told The Associated Press in an email. "Only one man has the power to stop the madness. Yet, he continues to pretend he's doing a good deed by getting people off the couch and into nature."

Wallace's wife, Mitzi Wallace, has taken a different stance. She told The Associated Press that the family had searched for the treasure together, and that it would be a mistake for the hunt to end. "Our treasure is that time we spend together," she said last week.

Kassetas said it's not just the safety of the treasure hunters that concerns him, but also that of professional law enforcement officers who conduct search-and-rescue missions.

"The family of this last man made a call for help, and I can't turn my back and say it was related to something risky so we can't respond," he said. "We have to respond, and I have to keep in mind the safety of the first responders. I would feel terrible if I have to make a phone call to a family of a search-and-rescue member if that death could have been avoided."

But there are numerous rescue missions in the New Mexico wilderness each year that are unrelated to the treasure, and many outdoor activities pose risks.

But people who take it more seriously, spending a lot of time and money on the search, should be aware that historical evidence suggests finding any hidden treasure is a long shot.

"Some people have spent decades of their life looking for these things," he said.

The best way to ensure that no more lives are lost in the search for Fenn's treasure is for Fenn to announce that he has retrieved the chest and that the search is over, Radford said.

Rather than turn hunters away, he said, the deaths renew interest in the treasure.

Publicity about the hunt continues to boost sales of Fenn's autobiography. The book is still selling well, said Dorothy Massey, owner of the Collected Works Bookstore. A poster of *The Thrill of the Chase* greets incoming shoppers at the downtown store.

"We sell a great many copies of Forrest's books ... even to many who have no interest in going on a treasure hunt," she said.

Fenn said *Thrill* has sold 22,000 copies. Those who say he is continuing the search to increase his profits from the book are mistaken, he said.

"People think the whole thing's a hoax to sell books," Fenn said. "... I get nothing out of it."

Most of the proceeds go to Collected Works. Fenn turned the book over to the store after printing the first 1,000 copies. Collected Works, which now has to cover the cost of the book's production, gives 10 percent of the profits from book sales to a fund supporting cancer patients and keeps the rest.

"So far, we have given away about \$70,000," Fenn said of the cancer fund.

Another book about his life, friendships and the search, *Too Far to Walk*, is a gift to his four grandchildren, who must keep up with its printing and distribution in exchange for keeping any profits. "They have to do all the work," Fenn said during an interview at his kitchen table, as one of his granddaughters arrived at his home after dropping 100 copies of the book at Collected Works.

Fenn spoke of helping his grandchildren learn business skills and pay for college. He also helps care for Peggy, his wife of 64 years. He still finds time to do several media interviews a week, answer some 200 emails and keep up with searchers and their stories through blogs and websites. He enjoys learning about their adventures.

“So many people don’t realize the wonders of nature and the smell of the forest and pine needles,” Fenn said. “Part of the problem is we sit at home and read too much. We watch the news too much.”

Contact Bruce Krasnow at brucek@sfnewmexican.com.

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Years of searching for the treasure hunter who would find the treasure

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Man says he has discovered Forrest Fenn's treasure

From the Archives: Chasing Forrest Fenn's treasure series

By Robert Nott rnott@sfnewmexican.com

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The saga of the search for Forrest Fenn's treasure continues to twist and turn through the court system.

Two weeks ago, David Harold Hanson of Colorado Springs, Colo., filed a lawsuit against Fenn for \$1.5 million, claiming Fenn has deprived him of the treasure through fraudulent statements and misleading clues.

Now an Arizona treasure hunter has filed a motion to intervene as a defendant for Fenn in that case, claiming he found the site of the treasure — which, in his view, is a “virtual art installation or metaphorical ‘treasure.’”

Brian Erskine of Prescott, Ariz., said in his complaint, filed in U.S. District Court last week, that he “solved the quest,” adding Fenn did not mislead anyone about the search.

He said the site in question is located in the San Juan Mountains of Colorado, between the towns of Silverton and Ouray and accessible by U.S. 550, also known as the “Million Dollar Highway.”

His court filing says he presumes Fenn “concealed a box at the site only metaphorically.” In addition, the court document says Erskine assumes a “controlled, voluntary transfer of box ownership by execution of a legal deed” from Fenn to whoever finds the treasure.

Among other arguments for his case, Erskine says abandoning a chest of valuables in the wild, as Fenn says he has done, would pose significant risks and uncertainty.

Speaking by phone, Erskine said he is positive he is right.

Erskine said in an email if Fenn does award him the treasure, he plans to sell it to "an institutional buyer for display/curation/public museum enjoyment and more quest development as a great cultural and literary legacy of the West, ideally here in Prescott, Arizona, which is a place a lot like Santa Fe."

He said he doesn't think people, including treasure hunters, will be disappointed that the search may come to an end.

"I don't think there's any loss of hundreds of thousands of people running around the West looking for something that is not there," he said.

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Robert Nott has covered education and youth issues for the Santa Fe New Mexican. He is assigned to The New Mexican's city desk where he covers a general assignment beat.

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