

**Antitrust Law:
Case Development and Litigation Strategy**

United States v. Zito

Supplemental Case Study on Sentencing

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United States v. Zito

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PRESS RELEASE

Executive Pleads Guilty to Criminal Attempted Monopolization

Monday, October 31, 2022

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For Immediate Release

Office of Public Affairs

Construction Company President Admits to Violating Section 2 of the Sherman Act

The president of a paving and asphalt contractor based in Billings, Montana, has pleaded guilty to attempting to monopolize the market for highway crack-sealing services in Montana and Wyoming.

According to the one-count felony charge filed on Sept. 19 in the U.S. District Court for the District of Montana, Nathan Nephi Zito attempted to monopolize the markets for highway crack-sealing services in Montana and Wyoming by proposing that his company and its competitor allocate regional markets. The charge states that as early as January 2020, Zito approached a competitor about a “strategic partnership” and proposed that the competitor stop competing with Zito’s company for highway crack-sealing projects administered by Montana and Wyoming. In return, Zito’s company would stop competing with the competitor for projects administered by South Dakota and Nebraska. Zito offered to pay his competitor \$100,000 as additional compensation for lost business in Montana and Wyoming. Zito further proposed that he and his competitor enter into a sham transaction to disguise their collusion. The charge states that Zito intended to monopolize the highway crack-sealing services markets in Montana and Wyoming. Today, the District Court accepted the guilty plea that was allocated on Oct. 14, when Zito admitted to the facts contained in the charge.

“Congress criminalized monopolization and attempted monopolization to combat criminal conduct that subverts competition,” said Assistant Attorney General Jonathan Kanter of the Justice Department’s Antitrust Division. “The Justice Department will continue to prosecute blatant and illegitimate monopoly behavior that subjects the American public to harm.”

“Any effort to cheat American taxpayers by subverting the government contracting process will be vigorously pursued by our office and our law enforcement partners,” said U.S. Attorney Jesse Laslovich for the District of Montana. “The result in this case shows that any person or entity in Montana that attempts to stifle competition by violating our federal antitrust laws will be held accountable for their criminal actions.”

“Maintaining our highway infrastructure is important to sustaining American prosperity,” said Inspector General Eric J. Soskin of the Department of Transportation. “U.S. taxpayers should have confidence in the integrity of the bidding process so that transportation dollars are spent on real improvements, not monopoly profits.”

Zito pleaded guilty to one count of attempted monopolization in violation of the Sherman Act. He faces a maximum sentence of 10 years' imprisonment and a maximum fine of \$1 million. The defendant's sentencing has been scheduled for Feb. 23, 2023.

The guilty plea is the result of a joint investigation conducted by the Antitrust Division's San Francisco Office, the U.S. Attorney's Office for the District of Montana and the Department of Transportation Office of Inspector General as part of the Justice Department's Procurement Collusion Strike Force (PCSF). In November 2019, the Department of Justice created the Procurement Collusion Strike Force (PCSF), a joint law enforcement effort to combat antitrust crimes and related fraudulent schemes that impact government procurement, grant and program funding at all levels of government – federal, state and local. To learn more about the PCSF, or to report information on market allocation, price fixing, bid rigging and other anticompetitive conduct related to defense-related spending, go to <https://www.justice.gov/procurement-collusion-strike-force>.

Anyone with information in connection with this investigation should contact the Antitrust Division's Complaint Center at 888-647-3258, or visit <http://www.justice.gov/atr/report-violations>.

Updated October 31, 2022

Attachments

[Charge](#) [PDF, 555 KB]

[Plea Agreement](#) [PDF, 2 MB]

Topic

ANTITRUST

Component

[Antitrust Division](#)

Press Release Number: 22-1173

Related Content

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FILED

SEP 19 2022

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**ATTORNEYS FOR PLAINTIFF
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>NATHAN NEPHI ZITO,</p> <p style="text-align: center;">Defendant.</p>	<p>CR 22- 113-BLG- SPW</p> <p>INFORMATION</p> <p>ATTEMPTED MONOPOLIZATION Title 15 U.S.C. § 2 (Penalty: Ten years of imprisonment, \$1,000,000 fine, and three years of supervised release)</p>
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The United States of America, acting through its attorneys, charges:

BACKGROUND

At all times relevant to this Information:

1. The United States Department of Transportation (“U.S. DOT”), a federal agency under the executive branch of the Government of the United States, administers and distributes federal funds to state and local government agencies responsible for, among other things, the construction, maintenance, and rehabilitation of highways, bridges, and tunnels. Federal Highway Administration (“Federal Highway”) is an agency within U.S. DOT and it supports state and local governments in the design, construction, and maintenance of the federal highways.

2. The Montana Department of Transportation (“MDOT”) is an agency under the executive branch of the State of Montana, and it oversees construction, maintenance, and rehabilitation of transportation infrastructure in Montana.

Similarly, the Wyoming Department of Transportation (“WYDOT”), an agency under the executive branch of the State of Wyoming, oversees construction, maintenance, and rehabilitation of transportation infrastructure in Wyoming.

3. Crack sealing is the process of filling cracks in asphalt or pavement to prevent water, sand, and dirt from damaging the substrate. MDOT and WYDOT invite contractors to compete for crack sealing projects on Montana and Wyoming highways and other public roadways and typically award projects to the lowest

bidders. These crack sealing projects are often funded in whole or in part by U.S. DOT.

4. COMPANY A is a paving and asphalt contractor incorporated in the State of Montana and headquartered in Billings, Montana. The defendant, NATHAN NEPHI ZITO, is the owner and president of COMPANY A.

Approximately 95% of COMPANY A's business comes from providing crack sealing services on publicly-funded highway projects.

5. COMPANY B is a paving and asphalt contractor. INDIVIDUAL 1 is the owner and president of COMPANY B.

6. COMPANY A and COMPANY B routinely compete for the same publicly-funded highway crack sealing projects and, in many instances, are the only two companies that submit bids for crack sealing projects administered by WYDOT and state departments of transportation in neighboring states.

7. Whenever in this Information reference is made to any act, deed, or transaction of a business organization, the allegation means that the business organization engaged in the act, deed, or transaction by or through its officers, directors, employees, agents, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

DESCRIPTION OF THE OFFENSE

8. In January 2020, ZITO telephoned INDIVIDUAL 1 to propose a “strategic partnership.” INDIVIDUAL 1 reported ZITO’s phone call to Federal Highway, which notified the U.S. DOT Office of Inspector General (“U.S. DOT OIG”). With INDIVIDUAL 1’s cooperation, U.S. DOT OIG recorded additional phone calls between ZITO and INDIVIDUAL 1 between March and October 2020.

9. Over the course of those calls, ZITO proposed that COMPANY A and COMPANY B stop competing against each other by dividing territories in Montana, Wyoming, and neighboring states. Under the terms of this proposed market-allocation agreement, which ZITO laid out in a June 16, 2020 call, INDIVIDUAL 1’s COMPANY B would stop bidding for publicly-funded highway crack sealing projects in Montana and Wyoming and ZITO’s COMPANY A would do the same in South Dakota and Nebraska. ZITO proposed that COMPANY A pay COMPANY B \$100,000 as additional compensation for COMPANY B’s lost business in Montana and Wyoming.

10. From the outset, ZITO stated his intention to eliminate COMPANY B as a competitor in Montana and Wyoming. He told INDIVIDUAL 1 that if they agreed not to compete, their companies’ revenue streams would be more stable and their margins would be higher.

11. ZITO proposed that COMPANY A and COMPANY B enter into a

written contract that memorialized the market-allocation agreement, but obscured its effects. The written contract included an option to purchase COMPANY B, even though INDIVIDUAL 1 told ZITO that he had no intention of selling his company, and the sale of a piece of equipment valued significantly above its worth.

12. Ultimately, INDIVIDUAL 1 refused to enter into the sham agreement and rejected ZITO's invitation to divide territories and end competition between COMPANY A and COMPANY B in Montana, Wyoming, South Dakota, and Nebraska.

COUNT 1

Beginning at least as early as January 2020, and continuing until at least October 2020, in Billings, within Yellowstone County, in the State and District of Montana, and elsewhere, the defendant, NATHAN NEPHI ZITO, knowingly engaged in anticompetitive conduct with the intent to gain monopoly power in the markets for highway crack sealing services in Montana and Wyoming. There existed a dangerous probability that, had the defendant's proposed market allocation been effectuated, COMPANY A would have gained monopoly power in those markets. The defendant's conduct occurred in and affected interstate commerce. All in violation of 15 U.S.C. § 2.

///

///

DATED this ____ day of September, 2022.


U.S. ATTORNEY'S OFFICE
DISTRICT OF MONTANA, by



JESSE A. LASLOVICH
United States Attorney




CYNDEE L. PETERSON
Criminal Chief Assistant U.S. Attorney

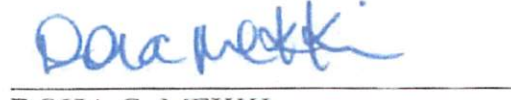


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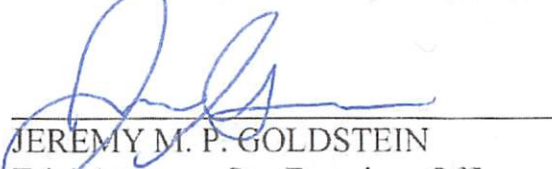
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**U.S. District Court
District of Montana (Billings)
CRIMINAL DOCKET FOR CASE #: 1:22-cr-00113-SPW-1**

Case title: USA v. Zito

Date Filed: 09/19/2022

Date Terminated: 03/30/2023

Assigned to: Judge Susan P. Watters

Defendant (1)

Nathan Nephi Zito
TERMINATED: 03/30/2023

represented by **Peter F. Lacny**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

15:2.F ATTEMPTED MONOPOLIZATION
(1)

Disposition

DFT SENTENCED ON THE INFORMATION
TO 3 YEARS PROBATION with standard and
special conditions apply. Fine 27,000.00, special
assessment 100.00.

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

Highest Offense Level (Terminated)

None

Complaints

None

Disposition

Plaintiff

USA

represented by **Bryan T. Dake**
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Date Filed	#	Docket Text
09/19/2022	1	INFORMATION as to Nathan Nephi Zito (1) count(s) 1. (AMC) (Entered: 09/19/2022)
09/19/2022	2	PLEA AGREEMENT as to Nathan Nephi Zito. (Defense attorneys initials are missing on the last page, case manager will hold original plea to get corrected and the change of plea hearing) (AMC) (Additional attachment(s) added on 10/14/2022: # 1 Completed Plea Agreement) (JDH). (Entered: 09/19/2022)
09/20/2022	3	Unopposed MOTION TO CHANGE PLEA by Nathan Nephi Zito. (Attachments: # 1 Text of Proposed Order) (Lacny, Peter) (Entered: 09/20/2022)
09/20/2022	4	ORDER REFERRING CASE to Magistrate Judge Timothy J. Cavan for purposes of scheduling and conducting the INITIAL APPEARANCE and CHANGE OF PLEA HEARING as to Nathan Nephi Zito. Signed by Judge Susan P. Watters on 9/20/2022. (AMC) (Entered: 09/20/2022)
09/20/2022	5	ORDER SETTING ARRAIGNMENT AND CHANGE OF PLEA HEARING as to Nathan Nephi Zito. Provided the parties consent, the Court will conduct an arraignment followed by a change of plea hearing on October 14, 2022, at 9:00 a.m. in Billings, MT before Magistrate Judge Timothy J. Cavan. Signed by Magistrate Judge Timothy J. Cavan on 9/20/2022. (JDH) (Entered: 09/20/2022)
09/20/2022	6	NOTICE OF ATTORNEY APPEARANCE Jeremy Michael Purkey Goldstein appearing for USA. (Goldstein, Jeremy Michael) (Entered: 09/20/2022)
09/26/2022	7	OFFER OF PROOF as to Nathan Nephi Zito (Dake, Bryan) (Entered: 09/26/2022)
10/14/2022	8	MINUTE ENTRY for proceedings held before Magistrate Judge Timothy J. Cavan: Change of Plea Hearing as to Nathan Nephi Zito held on 10/14/2022. Retained counsel Peter Lacny appearing with defendant (not in custody); AUSA Bryan Dake and AUSA Jeremy Michael Goldstein present. Deft files a waiver of indictment. Deft consents to USMJ. Terms of PA outlined. Deft sworn in and answers standard questions given by the court; deft advised of his rights, rights waived and lost, and max penalties. Govt reads the elements and offer of proof into the record. The deft states guilt. The Court finds the deft competent to enter plea. Deft understands charges, penalties, and rights forfeited. Deft enters a GUILTY plea to the Information. The Court to recommend that Judge Watters accept the guilty plea. Deft advised of the 14 day objection deadline. Deft advised of the PSR procedure. Deft is released subject to standard and special conditions pending sentencing. Hearing commenced at 9:08 a.m. and concluded at 9:43 a.m. (Court Reporter FTR Gold) (USPO: Cameron Peters), (Law Clerk: L. Amongero), (Hearing held in Big Horn Courtroom - Billings) (JDH) (Entered: 10/14/2022)
10/14/2022		Terminate Deadlines and Hearings as to Nathan Nephi Zito: Arraignment. (JDH) (Entered: 10/14/2022)
10/14/2022	9	WAIVER OF INDICTMENT by Nathan Nephi Zito (JDH) (Entered: 10/14/2022)
10/14/2022	10	CONSENT TO proceed before a Magistrate Judge for a Guilty Plea as to Nathan Nephi Zito (JDH) (Entered: 10/14/2022)
10/14/2022	11	ORDER Setting Conditions of Release as to Nathan Nephi Zito Signed by Magistrate Judge Timothy J. Cavan on 10/14/2022. (JDH) (Entered: 10/14/2022)

10/14/2022	13	FINDINGS AND RECOMMENDATIONS on Plea of Guilty as to Nathan Nephi Zito Signed by Magistrate Judge Timothy J. Cavan on 10/14/2022. (JDH) (Entered: 10/14/2022)
10/31/2022	14	ORDER ADOPTING FINDINGS AND RECOMMENDATIONS IN FULL AND SETTING SENTENCING as to Nathan Nephi Zito. (Sentencing set for 2/24/2023 at 09:30 AM in Billings, MT before Judge Susan P. Watters.) Signed by Judge Susan P. Watters on 10/31/2022. (AMC) (Entered: 10/31/2022)
02/10/2023	15	SENTENCING MEMORANDUM by Nathan Nephi Zito (Attachments: # 1 Exhibit A) (Lacny, Peter) (Entered: 02/10/2023)
02/10/2023	16	NOTICE OF FILING OF SENTENCING LETTERS by Nathan Nephi Zito (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25) (Lacny, Peter) (Entered: 02/10/2023)
02/10/2023	17	SENTENCING MEMORANDUM by USA as to Nathan Nephi Zito (Dake, Bryan) (Entered: 02/10/2023)
02/17/2023	18	RESPONSE by Nathan Nephi Zito <i>DEFENDANT'S RESPONSE TO GOVERNMENT'S SENTENCING MEMORANDUM</i> (Lacny, Peter) (Entered: 02/17/2023)
02/21/2023	19	ORDER RESETTING SENTENCING as to Nathan Nephi Zito. Sentencing RESET for 3/29/2023 at 03:30 PM in Billings, MT before Judge Susan P. Watters. Signed by Judge Susan P. Watters on 2/21/2023. (AMC) (Entered: 02/21/2023)
03/29/2023	20	MINUTE ENTRY for proceedings held before Judge Susan P. Watters: SENTENCING held on 3/29/2023 for Nathan Nephi Zito. Dft present and NOT in custody appearing with retained counsel Peter Lacny, AUSA Bryan Dake, Michael Goldstein. PSR received/reviewed by Govt; no objections, moves for a two level decrease, Judge GRANTS. PSR received/reviewed by defense, no objections. Judge will rely on PSR and accepts the plea agreement. Court reviews statutory and guideline calculations. Arguments made. Court reviews 3553(a) factors. DFT SENTENCED ON THE INFORMATION TO 3 YEARS PROBATION with standard and special conditions apply. Fine 27,000.00, special assessment 100.00. Dft has waived his right to appeal. Hearing commenced at 3:30 pm and concluded at 4:25 pm Presentence Report due by 4/5/2023. (Court Reporter Kim Marchwick) (USPO: McKenna Arledge), (Law Clerk: D. Connelley), (Hearing held in Billings-SMC) (AMC) (Entered: 03/29/2023)
03/30/2023	21	JUDGMENT as to Nathan Nephi Zito (1), Count(s) 1, DFT SENTENCED ON THE INFORMATION TO 3 YEARS PROBATION with standard and special conditions apply. Fine 27,000.00, special assessment 100.00. Signed by Judge Susan P. Watters on 3/30/2023. (AMC) (Entered: 03/30/2023)
03/30/2023	22	STATEMENT OF REASONS as to Nathan Nephi Zito re 21 Judgment Signed by Judge Susan P. Watters on 3/30/2023. (sealed emailed to both counsel) (AMC) (Entered: 03/30/2023)
03/30/2023	23	PRESENTENCE INVESTIGATION REPORT (Sealed) as to Nathan Nephi Zito. (sealed emailed to both counsel) (AMC) (Main Document 23 replaced on 3/30/2023) (AMC). (Entered: 03/30/2023)
03/31/2023	24	TRANSCRIPT ORDER FORM for Sentencing Hearing by USA for proceedings held on 3/29/2023 before Judge Watters. Court reporter Kim Marchwick. Type of transcript: 30-Day. Transcript due by 4/28/2023. (Dake, Bryan) (Entered: 03/31/2023)
05/10/2023	25	TRANSCRIPT of Sentencing Hearing as to Nathan Nephi Zito held on Wednesday, March 29, 2023, before Judge Susan P. Watters. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerks office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter Kim Marchwick, 406-671-2307, marchwickkim@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website. Redaction Request due 5/31/2023. Redacted Transcript Deadline set for 6/12/2023. Release of Transcript Restriction set for 8/8/2023. (Marchwick, Kim) (Entered: 05/10/2023)
07/11/2023	26	MOTION to Amend/Correct <i>PROBATION CONDITIONS</i> by Nathan Nephi Zito. (Lacny, Peter) (Entered: 07/11/2023)
07/11/2023	27	BRIEF/MEMORANDUM in Support by Nathan Nephi Zito (Lacny, Peter) (Entered: 07/11/2023)

07/21/2023	28	RESPONSE to Motion by USA as to Nathan Nephi Zito re 26 MOTION to Amend/Correct <i>PROBATION CONDITIONS</i> (Dake, Bryan) (Entered: 07/21/2023)
07/24/2023	29	REPLY TO RESPONSE to Motion by Nathan Nephi Zito re 26 MOTION to Amend/Correct <i>PROBATION CONDITIONS</i> (Lacny, Peter) (Entered: 07/24/2023)
07/31/2023	30	ORDER granting in part and denying in part 26 Motion to Amend/Correct as to Nathan Nephi Zito (1). Signed by Judge Susan P. Watters on 7/31/2023. (EMH) (Entered: 07/31/2023)
08/10/2023		Terminate Deadlines (RELEASE OF TRANSCRIPT RESTRICT FOR DOC 25) as to Nathan Nephi Zito. (AMC) (Entered: 08/10/2023)

FILED

SEP 19 2022

Clerk, U S District Court
District Of Montana
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**ATTORNEYS FOR PLAINTIFF
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>NATHAN NEPHI ZITO,</p> <p style="text-align: center;">Defendant.</p>	<p>CR 22-113-BLG-SPW</p> <p>PLEA AGREEMENT (Rule 11(c)(1)(A) and (B), <i>Federal Rules of Criminal Procedure</i>)</p>
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<u>RW</u>	<u>NZ</u>	<u>PL</u>	<u>8/31/22</u>
AUSA	DEF	ATTY	Date

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, represented by Bryan T. Dake, Assistant United States Attorney for the District of Montana, and Jeremy M. P. Goldstein, Trial Attorney, United States Department of Justice, Antitrust Division; the defendant, Nathan Nephi Zito; and the defendant's attorney, Peter Lacny, have agreed upon the following:

1. **Scope:** This plea agreement is between the United States Attorney's Office for the District of Montana, the United States Department of Justice, Antitrust Division, and the defendant. It does not bind any other federal, state, or local prosecuting, administrative, or regulatory authority, or the United States Probation Office.

2. **Charge:** The defendant agrees to plead guilty to the sole count contained in the information, charging attempted monopolization, in violation of 15 U.S.C. § 2. This count carries a maximum term of imprisonment of ten years, a \$1,000,000 fine, up to three years of supervised release following the term of imprisonment, and a \$100 special assessment.

3. **Nature of the Agreement:** The parties agree that this plea agreement will be governed by: Rule 11(c)(1)(A) and (B), Federal Rules of Criminal Procedure. The defendant acknowledges that the agreement will be fulfilled provided: a) the United States does not bring additional charges against the defendant relating to the same conduct; and b) makes the recommendations

<u>RAW</u>	<u>NZ</u>	<u>P</u>	<u>5/31/22</u>
AUSA	DEF	ATTY	Date

provided below. The defendant understands that if the agreement is accepted by the Court, there will not be an automatic right to withdraw the plea even if the Court does not accept or follow the recommendations made by the United States.

Agreement as to fine: The defendant agrees to a specific fine amount of \$27,000. The defendant understands that this fine will be imposed at the time of sentencing.

4. Admission of Guilt: The defendant will plead guilty because the defendant is guilty of the charge contained in the information and admits to the facts contained therein.

In pleading guilty to the sole count in the information, the defendant also acknowledges that:

First, the defendant engaged in anticompetitive conduct;

Second, the defendant acted with a specific intent to gain monopoly power in the markets for highway crack-sealing services in Montana and Wyoming;

Third, the defendant took actions that were a substantial step toward committing the crime of monopolization and that strongly corroborated the defendant's intent to commit that crime;

Fourth, there was a dangerous probability that, had the defendant's conduct succeeded, the defendant's company would have gained monopoly power in the markets for highway crack-sealing services in Montana and Wyoming; and

<u>Law</u>	<u>NZ</u>	<u>PL</u>	<u>8/31/22</u>
AUSA	DEF	ATTY	Date

Fifth, that the defendant's conduct occurred in and affected interstate commerce.

5. Waiver of Rights by Plea:

(a) The defendant is entitled to have the charges outlined in paragraph 2, above, prosecuted by an indictment returned by a concurrence of 12 or more members of a legally constituted grand jury, consisting of not less than 16 and not more than 23 members.

(b) The government has a right to use against the defendant, in a prosecution for perjury or false statement, any statement given under oath during the plea colloquy.

(c) The defendant has the right to plead not guilty or to persist in a plea of not guilty.

(d) The defendant has the right to a jury trial unless, by written waiver, the defendant consents to a non-jury trial. The United States must also consent and the Court must approve a non-jury trial.

(e) The defendant has the right to be represented by counsel and, if necessary, have the Court appoint counsel at trial and at every other stage of these proceedings.

(f) If the trial is a jury trial, the jury would be composed of 12 laypersons selected at random. The defendant and the defendant's attorney would

KAW ME PL 8/31/22
AUSA DEF ATTY Date

have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt.

(g) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not the judge was persuaded of the defendant's guilt beyond a reasonable doubt.

(h) At a trial, whether by a jury or a judge, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those government witnesses and the defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence. If the witnesses for the defendant would not appear voluntarily, their appearance could be mandated through the subpoena power of the Court.

(i) At a trial, there is a privilege against self-incrimination so that the defendant could decline to testify and no inference of guilt could be drawn from the refusal to testify. Or the defendant could exercise the choice to testify.

Ren NZ PL 8/31/22
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(j) If convicted, and within 14 days of the entry of the Judgment and Commitment, the defendant would have the right to appeal the conviction to the Ninth Circuit Court of Appeals for review to determine if any errors were made that would entitle the defendant to reversal of the conviction.

(k) The defendant has a right to have the district court conduct the change of plea hearing required by Rule 11, Federal Rules of Criminal Procedure. By execution of this agreement, the defendant waives that right and agrees to hold that hearing before, and allow the Rule 11 colloquy to be conducted by, the U.S. Magistrate Judge, if necessary.

(l) If convicted in this matter, a defendant who is not a citizen of the United States may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

The defendant understands that by pleading guilty pursuant to this agreement, the defendant is waiving all of the rights set forth in this paragraph. The defendant's attorney has explained those rights and the consequences of waiving those rights.

6. Recommendations: The United States will recommend the defendant's offense level be decreased by two levels for acceptance of responsibility, pursuant to USSG §3E1.1(a), unless the defendant is found to have obstructed justice prior to sentencing, pursuant to USSG §3C1.1, or acted in any

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way inconsistent with acceptance of responsibility. The United States will move for an additional one-level reduction, pursuant to USSG §3E1.1(b), if appropriate under the Guidelines. The parties reserve the right to make any other arguments at the time of sentencing beyond those outlined in this agreement.

7. **Sentencing Guidelines:** Although advisory, the parties agree that the U.S. Sentencing Guidelines must be applied, and a calculation determined, as part of the protocol of sentencing to determine what sentence will be reasonable. The parties further agree that the sections of the U.S. Sentencing Guidelines applicable to the defendant's conduct are USSG §2R1.1, based on the application of USSG §§2X5.1, and 2X1.1 and that the relevant volume of commerce amount for calculating a sentence under USSG §2R1.1 is \$2,700,000.

8. **Waiver of Appeal of the Conviction and Sentence – General:** The defendant understands that the law provides a right to appeal and collaterally attack the conviction and sentence imposed in this case. 18 U.S.C. § 3742(a); 28 U.S.C. §§ 2241, 2255. Based on the concessions made by the United States, the defendant knowingly waives any right to appeal or collaterally attack any aspect of the conviction and sentence, including conditions of probation or supervised release. This waiver includes challenges to the constitutionality of any statute of conviction and arguments that the admitted conduct does not fall within any statute of

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conviction. This waiver does not prohibit the right to pursue a collateral challenge alleging ineffective assistance of counsel.

9. Voluntary Plea: The defendant and the defendant's attorney acknowledge that no threats, promises, or representations have been made to induce the defendant to plead guilty, and that this agreement is freely and voluntarily endorsed by the parties.

10. Detention/Release After Plea: The United States agrees that it will not move for detention, but will defer to the discretion of the Court the decision as to whether the defendant meets the conditions of 18 U.S.C. § 3143(a)(1) or (2), and whether the defendant has clearly shown exceptional reasons why detention is not appropriate. 18 U.S.C. § 3145(c). The United States is obligated to advise the Court of the appropriate legal standards that relate to the defendant's eligibility for post-conviction release. The defendant acknowledges that obligation and understands that advising the Court as to the law and facts is not an abrogation of its agreement not to request remand.

11. Disclosure of Financial Information: The defendant authorizes the U.S. Probation Office to release to the Financial Litigation Unit of the U.S. Attorney's Office all documents and financial information provided by the defendant to the U.S. Probation Office and any information obtained by the U.S. Probation Office about the defendant through its investigation. The defendant

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further agrees to fully complete a financial statement in the form prescribed by the U.S. Attorney's Office, provide financial documents as requested, and submit to a debtor's exam if deemed appropriate by the U.S. Attorney's Office, in order to evaluate the defendant's ability to satisfy any financial obligation imposed by the Court. The defendant consents to being immediately placed on the Treasury Offset Program to help meet the defendant's obligation to pay restitution and/or a fine.

12. Breach: If the defendant breaches this plea agreement, at any time, in any way, including but not limited to appealing or collaterally attacking the conviction or sentence, the United States may prosecute the defendant for any counts dismissed or not charged pursuant to this plea agreement. Additionally, the United States may use any factual admissions made by the defendant pursuant to this plea agreement in any such prosecution.

13. Debarment: The defendant understands that he may be subject to suspension or debarment action by state or federal agencies other than the United States Department of Justice based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls what action, if any, other agencies may take. However, the United States Attorney's Office and the United States Department of Justice, Antitrust Division, agree that, if requested, it will advise the appropriate officials of any governmental agency considering such action of the fact, manner, and extent of the defendant's role in the charged

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conduct as a matter for that agency to consider before determining what action, if any, to take. The defendant nevertheless affirms that he wants to plead guilty regardless of any suspension or debarment consequences of his plea.

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14. **Entire Agreement:** Any statements or representations made by the United States, the defendant, or defense counsel prior to the full execution of this plea agreement are superseded by this plea agreement. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. This plea agreement constitutes the entire agreement between the parties. Any term or condition which is not expressly stated as part of this plea agreement is not to be considered part of the agreement.

JESSE A. LASLOVICH
United States Attorney



(for) BRYAN T. DAKE
Assistant U. S. Attorney
Date: 9/19/22

U.S. Department of Justice,
Antitrust Division



JEREMY M. P. GOLDSTEIN
Trial Attorney
Date: 9/19/2022



NATHAN NEPHI ZITO
Defendant
Date: 8/31/22



PETER LACNY
Defense Counsel
Date: 9-19-2022

<u>PCW</u>	<u>NE</u>		<u>8/31/22</u>
AUSA	DEF	ATTY	Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATHAN NEPHI ZITO,

Defendant.

CR 22-113-BLG-SPW-TJC

**FINDINGS AND
RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

The Defendant, by consent, appeared before me under Fed. R. Crim. P. 11 and entered a plea of guilty to the Information, which charges the crime of attempted monopolization, in violation of 15 U.S.C. § 2.

After examining the Defendant under oath, the Court determined:

1. That the Defendant is fully competent and capable of entering an informed and voluntary plea to the criminal offense charged against him;
2. That the Defendant is aware of the nature of the charge against him and the consequences of pleading guilty to the charge;
3. That the Defendant fully understands his pertinent constitutional rights and the extent to which he is waiving those rights by pleading guilty to the criminal offense charged against him; and

4. That his plea of guilty to the criminal offense charged against him is knowingly and voluntarily entered, and is supported by independent factual grounds sufficient to prove each of the essential elements of the offense charged.

The Court further concludes that the Defendant had adequate time to review the Plea Agreement with counsel, that Defendant fully understands each and every provision of the agreement and that all of the statements in the Plea Agreement are true.

Therefore, I recommend that the Defendant be adjudged guilty of the charge in the Information and that sentence be imposed.

Objections to these Findings and Recommendation are waived unless filed and served within fourteen (14) days after the filing of the Findings and Recommendation. 28 U.S.C. § 636(b)(1)(B); Fed. R. Crim. P. 59(b)(2).

DATED this 14th day of October, 2022.



TIMOTHY J. CAVAN
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATHAN NEPHI ZITO,

Defendant.

CR 22-113-BLG-SPW

**ORDER SETTING
SENTENCING**

Defendant entered his plea of guilty before U.S. Magistrate Judge Timothy J. Cavan in open court on October 14, 2022. United States Magistrate Judge Timothy J. Cavan entered Findings and Recommendation in this matter on October 14, 2022 (Doc. 13). No objections having been filed within fourteen days thereof,

IT IS HEREBY ORDERED that Judge Cavan's Findings and Recommendations (Doc. 13) are ADOPTED IN FULL;

Therefore,

IT IS HEREBY ORDERED that,

1. Sentencing is set for **Friday, February 24, 2023 at 9:30 a.m.**, in the James F. Battin Courthouse, 2601 Second Avenue North, Billings, Montana.

2. The United States Probation Office shall conduct a presentence investigation and prepare a presentence report. Fed. R. Crim. P. 32(c), (d); 18 U.S.C. § 3552(a).

3. The probation officer shall disclose the completed report, except for recommendations of the probation officer as follows: **two copies** to counsel for Defendant, and **one copy** to counsel for the government on or before **January 10, 2023**. The probation officer shall not disclose any recommendation made or to be made to the Court.

4. If restitution is mandatory, the probation officer shall discuss a payment plan with Defendant and shall make recommendations to the Court concerning interest and a payment schedule.

5. Counsel shall attempt in good faith to resolve disputes over any material in the presentence report. Unresolved objections to be relied upon at sentencing shall be presented to the probation officer on or before **January 20, 2023**. U.S.S.G. § 6A1.2. If there is a dispute over any material in the presentence report, counsel shall meet with the probation officer and attempt to resolve disputes informally by diligent good faith effort. Any requests for extensions of time to present objections to the probation officer must be granted by the Court. Extensions will not be granted absent compelling reasons. Any unresolved

objections are expected to be included in the pre-sentence report, not in a sentencing memorandum.

6. The presentence report, in final form, including any unresolved objections, shall be delivered to the Court and the parties on or before **February 3, 2023.**

7. Sentencing memoranda and supporting documents addressing all relevant sentencing issues shall be filed on or before **February 10, 2023.** Absent good cause shown, sentencing memoranda and supporting documents filed after February 10, 2023 will not be considered in addressing sentencing issues. Failure to timely file sentencing memoranda may result in imposition of sanctions against counsel.

8. Responses to sentencing memoranda shall be filed on or before **February 17, 2023. A party is not permitted to file a response unless the party has filed an opening sentencing memorandum.**

9. Reply briefs will not be accepted for filing in sentencing matters.

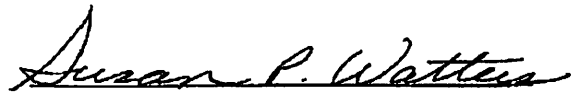
10. The Court will resolve objections included in the Addendum to the presentence report at the sentencing hearing in accordance with U.S.S.G. § 6A1.3.

11. All parties that intend to have witnesses testify at sentencing shall give notice to this Court ten (10) days prior to the sentencing date.

12. Defendant is released under the same terms and conditions pending sentencing.

The clerk shall promptly notify counsel and the probation office of the entry of this Order.

DATED this 31st day of October, 2022.


SUSAN P. WATTERS
United States District Judge

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**ATTORNEYS FOR PLAINTIFF
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

UNITED STATES OF AMERICA,	CR 22-113-BLG-SPW
Plaintiff,	
vs.	SENTENCING MEMORANDUM
NATHAN NEPHI ZITO,	
Defendant.	

INTRODUCTION

The defendant, Nathan Nephi Zito, has bid on highway construction and repair projects for over twenty years. As Mr. Zito knows, those projects are awarded through a competitive bidding process that identifies the lowest responsible bidder and helps guarantee that taxpayer money is spent responsibly, transparently, and fairly.

Not content to compete on the merits, however, Mr. Zito attempted to cheat the competitive bidding process. He pressed a competitor to divide among their companies two local markets for highway crack sealing projects and, in the process, to cease competing against Mr. Zito in Mr. Zito's core markets. Mr. Zito then attempted to disguise the purpose and effect of his conduct by crafting a sham transaction to provide perceived legal cover. He has entered into or tried to enter into similar deals with other companies in the past. Had Mr. Zito's conduct been successful, there would have been a dangerous probability that he would have eliminated competition and been free to raise prices or limit output.

The defendant's actions here are inexcusable. As the Sentencing Guidelines recognize, "there is near universal agreement that restrictive agreements among competitors," like the agreement Mr. Zito proposed, "can cause serious economic harm" and "serve no purpose other than to restrict output and raise prices." *See*

USSG § 2R1.1, Background. A sentence of imprisonment within the guideline range, followed by a term of supervised release, holds him accountable for his conduct and provides a strong deterrent to the defendant and to others who may seek to cheat the state's competitive bidding process for their own personal gain.

FACTS

Mr. Zito is the former owner and president of a paving and asphalt company headquartered in Billings, Montana. Presentence Investigation Report (“PSR”) at ¶ 7. In January 2020, he contacted the owner of a competing paving and asphalt company based in Sioux Falls, South Dakota, to propose a “strategic partnership.” *Id.* ¶¶ 7-8. The two companies frequently competed for the same publicly funded highway crack sealing projects administered by the Wyoming Department of Transportation, the South Dakota Department of Transportation, and neighboring state departments of transportation. *Id.* ¶ 7. In many instances, they were the only two companies that submit bids for these types of projects in Wyoming. *See id.*

After he was contacted by Mr. Zito, the competitor immediately reported Mr. Zito's outreach to the Federal Highway Administration, which then notified the Department of Transportation Office of Inspector General (“DOT OIG”). *Id.* ¶ 8. DOT OIG recorded over a dozen phone calls between Mr. Zito and the

competitor as Mr. Zito persisted—over many calls—to convince his competitor to strike a deal. *Id.* ¶¶ 8-11.

Over the course of those calls, the defendant proposed that the companies allocate markets for publicly funded crack sealing projects. *Id.* ¶¶ 8-9. Under the terms of the agreement, which the defendant laid out in a June 16, 2020 call: (1) the competitor would cease bidding for federal, state, and local crack sealing projects in Wyoming and Montana, essentially ceding those two states to the defendant’s company; (2) in return, the defendant would cease bidding for federal, state, and local crack sealing projects in South Dakota and Nebraska; and (3) the defendant would pay the competitor \$100,000 as compensation for his lost business in Wyoming and Montana. *Id.* ¶ 11.

The defendant was clear that he intended to significantly reduce competition for crack sealing projects in Montana and Wyoming. For instance, in one call, after the competitor asked the defendant if he was “looking for certain territories or certain areas so it limits the competition,” the defendant responded, “my biggest thing is, you know, if we weren’t fighting over Wyoming the margins would go up to a much more livable wage, you know, livable number.” *Id.* ¶ 9.

In another call, the defendant explained that he was looking to expand his business in Montana and elsewhere, but “want[ed] to do it in a way that we get

along because I really feel like you guys are the only ones that can compete with us. . . . There's not very many companies that can put the kind of asphalt we can put down. So I guess I would much rather get along with you guys in particular and come to some agreement than butt heads." *Id.* ¶ 10.

After proposing the agreement, Mr. Zito attempted to disguise the purpose and effect of the market allocation agreement. *Id.* ¶ 12. As Mr. Zito explained in a June 2020 voicemail, to make the agreement appear legal, the money he was paying his competitor to stay out of the Montana and Wyoming markets "should probably include some sort of equipment, like a broken-down kettle in the yard or something that is just going to waste." *Id.* The defendant then produced a sham written agreement, styled as an Asset Sale and Option Agreement, that falsely stated that the money he was paying his competitor was for the purpose of acquiring construction equipment. *Id.*

The defendant's outreach to his competitor in South Dakota in 2020 was not the only time that he entered into or attempted to enter into an agreement that allocated crack sealing markets in Montana and Wyoming. *Id.* ¶ 13. In past years, he successfully entered into a market allocation agreement with a second competitor and attempted to enter into such an agreement with a third. *Id.*

SENTENCING WITNESSES

The government does not anticipate testimony from any witnesses.

ARGUMENT

I. Legal Standards

The Court should impose a sentence sufficient but not greater than necessary to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008); *see also* 18 U.S.C. § 3553(a). The Court should begin the process of determining an appropriate sentence by calculating the correct sentencing range under the advisory Guidelines. *Id.*

After determining the appropriate advisory Guidelines calculation, the Court should then evaluate the sentence for substantive reasonableness considering the factors set out in Section 3553(a). *Id.* at 991-93. In arriving at the appropriate sentence for the defendant under Section 3553(a), the Court should consider these factors applicable to this case, among others:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;

- (2) The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (3) The need for the sentence imposed to afford adequate deterrence to criminal conduct;
- (4) The need for the sentence imposed to protect the public from further crimes of the defendant; and
- (5) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

II. The Presentence Report Correctly Calculates the Guideline Range

The United States has no objection to the Probation Office's determination that the total offense level for the defendant's conduct is 10, which results in a guideline range of six to 12 months' imprisonment. The total offense level reflects a base offense level of 12, USSG §2R1.1(1), and a three-level increase for the conduct involving participation in an agreement to submit non-competitive bids, USSG §2R1.1(b)(1), and a volume of commerce of \$2,700,000, USSG §2R1.1(b)(2)(A). The offense level was decreased by three levels because the defendant is charged with attempt to commit an underlying crime—monopolization—and two levels for acceptance of responsibility. USSG §§ 2X1.1(b)(1), 3E1.1(a).

The United States also believes that the \$27,000 fine agreed to by the parties is appropriate.

III. The 3553(a) Factors Weigh Heavily in Favor of a Term of Imprisonment

The United States recommends that the Court impose a sentence of imprisonment within the guideline range, three years of supervised release, and a \$27,000 fine. The sentence is reasonable and not greater than necessary in light of the factors articulated in 18 U.S.C. § 3553. Several factors weigh in favor of a sentence of imprisonment: the need for the sentence to reflect the seriousness of the offense, the history and characteristics of the defendant, respect for the rule of law, the need for general and specific deterrence, and avoiding unwarranted sentencing disparities.

First, sentencing the defendant to a term of imprisonment is appropriate given the seriousness of his offense. 18 U.S.C. § 3553(a)(2)(A). Antitrust crimes are by nature serious offenses. As the Guidelines explain, “there is near universal agreement that restrictive agreements among competitors, such as . . . market-allocation, can cause serious economic harm,” and, “[a]bsent adjustments, the guidelines require some period of confinement in the great majority of cases that are prosecuted.” USSG § 2R1.1, Background. The Guidelines’ “policy statements make plain that imprisonment is generally warranted for antitrust offenders.” *United States v. Rattoballi*, 452 F.3d 127, 136 (2d Cir. 2006); *see also* USSG § 2R1.1, Cmt. n.5 (“It is

the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.”). The offense is particularly serious here because had the defendant succeeded in monopolizing the markets for highway crack sealing in Montana and Wyoming, the victims of the conspiracy would have been federal and state taxpayers who could have been forced to pay more for highway construction and maintenance projects.

Second, a sentence of imprisonment is supported by “the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). The defendant has been a successful asphalt and pavement contractor for several decades and, as the Presentence Investigation Report makes clear, he has profited significantly from his business. *See* PSR ¶ 51. He did not need to engage in this conduct, and he knew it was wrong. *See id.* ¶ 51 (describing the defendant’s financial status). Over nearly 20 years, he has bid on dozens of projects administered by state departments of transportation, each of which required him or an agent of his company to attest that the submitted bid was the result of free and competitive bidding and not the product of collusion. Moreover, the defendant went to great lengths to conceal his actions, attempting to disguise the purpose and effect of his proposed market allocation agreement by concocting a sham asset transaction to make it appear legal.

Third, a sentence of imprisonment would “afford adequate deterrence to criminal conduct” by the defendant and other potential offenders and promote respect for the rule of law. *See* 18 U.S.C. § 3553(a)(2)(B). Bid-rigging and market allocation crimes are often difficult to detect and prosecute, particularly in consolidated markets like those at issue here. These crimes consist of secret agreements between individuals who are motivated to conceal their criminal activities. The difficulty in detecting these crimes is underscored by the fact that the defendant has entered into or attempted to enter into similar agreements on at least two occasions and took steps to disguise his misconduct in this case.

Deterrence is particularly important in the construction industry. Creating a competitive bidding process for federal and state transportation projects is important for minimizing costs associated with those projects and therefore obtaining the best value for taxpayers’ money. Competitive bidding will be particularly important in coming years as billions of new dollars in federal infrastructure spending are allocated to the states. A substantial portion of that funding could be wasted if the punishment for engaging in illegal conduct is not substantial enough to outweigh the expected criminal rewards from collusive and fraudulent behavior. A significant prison sentence for the defendant here will help the United States deter construction

contractors from engaging in collusive conduct on federal and state infrastructure projects.

Finally, a sentence of imprisonment would serve “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). Individuals like Mr. Zito routinely receive prison sentences for violations of federal antitrust laws. *See, e.g.*, Judgment, *U.S. v. Langan*, Case No. 3:20-CR-14 (D. Conn. Oct. 3, 2022) (sentencing defendant to a year and one day of imprisonment and a \$150,000 fine); Judgment, *U.S. v. Aiyer*, Case No. 18-CR-333 (S.D.N.Y. Oct. 2, 2020) (sentencing defendant to eight months’ imprisonment and \$150,000 fine); Judgment, *U.S. v. Dip*, Case No. 18-CR-20877 (S.D. Fl. June 25, 2019) (sentencing defendants to 18 months’ and 15 months’ imprisonment and \$20,000 fines each). Antitrust offenders have been sentenced to terms of imprisonment in cases where the volume of affected commerce was less than it is in this case and the defendant received a downward adjustment in his guidelines calculation for only playing a minor role in the offense. *See, e.g.*, Judgment, *U.S. v. Diaz*, Case No. 14-CR-00607 (N.D. Cal. March 13, 2017) (sentencing defendant to six months’ imprisonment); Plea Agreement, *U.S. v. Diaz*, Case No. 14-CR-00607 (N.D. Cal. Nov. 16, 2016) (calculating guideline range for stipulated volume of commerce of \$468,420).

As in those cases, a sentence of imprisonment would reflect the severity of the conduct and its harm to society.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court sentence the defendant to a term of imprisonment within the guideline range, three years of supervised release, and a \$27,000 fine.

DATED this 10th day of February, 2023.

JESSE A. LASLOVICH
United States Attorney

/s/ Bryan T. Dake
BRYAN T. DAKE
Assistant U.S. Attorney

/s/ Jeremy M. P. Goldstein
JEREMY M. P. GOLDSTEIN
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Attorneys for Defendant Nathan Nephi Zito

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATHAN NEPHI ZITO,</p> <p style="text-align: right;">Defendant.</p>	<p>Cause No.: CR 22-113-BLG-SPW</p> <p style="text-align: center;">DEFENDANT'S SENTENCING MEMORANDUM</p>
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NATHAN NEPHI ZITO, by and through counsel, submits this sentencing memorandum in advance of his February 24, 2023 sentencing hearing.

INTRODUCTION

Nathan Zito will be sentenced on his plea bargain conviction for an antitrust offense on February 24, 2023. With no criminal history and a total offense level of 10, the PSR has correctly calculated his advisory guideline range at 6-12 months. PSR, ¶ 54. Both statute and the advisory guidelines allow probation. PSR, ¶¶ 58-60. Because he is a first-time non-violent offender, in Zone B of the sentencing table, the guidelines encourage the Court “to consider a sentence other than imprisonment.” Application Note 4, *USSG 5C1.1*.

The parties have agreed to a \$27,000.00 fine that Nathan will pay the day of his sentencing hearing. Plea Agreement, ¶ 3; PSR, ¶ 55. There is no restitution. There are no objections to the PSR by the parties.

As discussed below, a sentence of probation is sufficient to meet the statutory purposes of sentencing outlined in 18 U.S.C. § 3553(a).

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SENTENCING RECOMMENDATION

I. Probation is an appropriate sentence for Nathan Zito.

The relevant factors of 18 U.S.C. 3553(a) are examined below. Collectively, the 3553(a) factors support a probationary sentence for Nathan.

A. The nature and circumstances of the offense.

Nathan does not minimize the seriousness of the offense conduct, which is described in the PSR. As indicated in his letter to the Court, he understands the harm his behavior can have on society and is remorseful for it. PSR, ¶ 17. Nathan voluntarily cooperated with the Government in its investigation and quickly accepted responsibility for his conduct by agreeing to a pre-indictment resolution, saving resources and recognizing his own culpability.

This offense was Nathan's first encounter with the criminal justice system, and it certainly will be his last. As discussed below, Nathan's personal history and characteristics indicate that this offense was a complete aberration, and that Nathan is highly unlikely to reoffend.

B. Nathan’s admirable personal history and characteristics warrant a community-based sentence.

Nathan has no criminal history and has lived his life the right way. He is a dedicated husband and father, is a generous and thoughtful business owner, and a citizen who has consistently volunteered his time to give back to his community to make it a better place.

Nathan was born in Hamilton, Montana and is 44 years old. Nathan and Amber have been married for fifteen years and have five children. PSR, ¶ 40. Amber describes Nathan as a “phenomenal father” who has an “amazing bond” with their children. PSR, ¶ 41.

Nathan grew up in Corvallis, Montana. Nathan’s father, a Vietnam Veteran, worked for the post office, while his mother cared for Nathan and his six siblings full time. PSR, ¶ 38. Growing up, Nathan’s family struggled financially, and Nathan “learned the value of hard work” from an early age. (April Dennis Character Letter.¹) Nathan began working when he was still in middle school, changing sprinkler pipes for his neighbors – a laborious task “that had to done twice a day all summer

¹ All letters cited in this Memorandum have been filed separately with the Court. *See Defendant’s Notice of Filing of Sentencing Letters*. Counsel received 62 letters of support for Nathan. A sample of 25 of the letters have been filed with the Court.

long.” (John and Laura Lee Zito Character Letter.) During his teen years, Nathan honed the lifelong hard work ethic that came to define him. Nathan became an Eagle Scout at fifteen, all while balancing a tough job at an asphalt company in the summers and attending high school full time. *Id.*

After graduating from high school, Nathan briefly attended college to study business. However, soon after starting, he felt that he had gained the knowledge to start his own asphalt sealing business through the on-the-job training he received during his high school summer job.

Nathan launched Z & Z Asphalt in 1997 with money that he had saved through high school, and a \$10,000.00 loan co-signed by his parents. PSR, ¶ 17. After starting Z & Z, Nathan worked “long, hard hours, did great work, and with the referrals from his customers” his business flourished. (John and Laura Lee Zito Character Letter.) As described by his long-time friend Mark Beddes, “twenty years ago, Nathan was just a simple guy that attempted to start a business with little to no formal education. He utilized his honesty and ability to work with people to do things he had no business doing.” (Mark Beddes Character Letter).

Over the next years, Nathan grew Z&Z Asphalt to “one of the largest maintenance contractors in a 6-state area.” (See, **Exhibit A** *Cliffside Neighbors* article on the Zito family.) As his business grew, Nathan created a company culture where employees with dignity and respect. He worked hard to maintain a “tremendous investment in the lives of [his] employees,” work-related or otherwise. (Michael Hill Character Letter.) As an example, “when one of his workers became urgently in need of health care, Nathan provided financial assistance so that the employee could receive emergency surgery he desperately needed but could not afford.” (Donald and Lisa Wilcox Character Letter.) Nathan saw himself as a mentor to his employees. As one former employee put it, Nate “inspired [him] on many occasions to set my sights higher and develop [himself] in areas [he] was failing.” (Christian Williams Character Letter.)

Although passionate about his business and work, Nathan’s true purpose in life has been and always will be his family. When Nathan and Amber married, Amber had a son (Aden) from a previous relationship. Nathan immediately stepped into the role as Aden’s sole father figure, “[extending] his heart and soul to the benefit and wellbeing of [Aden],”

and their relationship remains “indescribable.” (Amber Zito Character Letter.)

Aden describes Nathan as his “biggest role model” and “one of the most influential people in his life.” (Aden Winder Character Letter.) Aden, now 18, plans to dedicate his life to being a teacher and a coach to inspire young people, a goal Nathan instilled in him through “love, sacrifice, and guidance.” (Amber Zito Character Letter.)

All five of Nathan’s children “adore him in every sense of the word,” and Nathan is a dedicated and involved father. Whether it be “cheering at Aden's football games and wrestling matches, to standing on the sidelines while Heather runs track, to helping Aubrey with her hedgehog Oliver, to taking Summer on a daddy-daughter date to see Luke Combs in concert, to sponsoring and coaching Garrett's local soccer team, Nathan is there, actively engaged, and championing his children.” (Matthew and Sara Zabawa Character Letter.) Nathan and Amber have “cultivated a family that loves to work together, play together, and tease each other.” (*Id.*)

Throughout his life, Nathan has made it a priority to give back to his community and take care of others. Nathan saw his business as a

“method to invest back into people in the area.” See **Exhibit A**. Amber, the person who knows him better than anyone, chose “generosity” to describe Nathan in one word. (Amber Zito Character Letter.)

As his business thrived, Nathan realized that many people “rarely get the leadership training we need until [they] are adults.” See **Exhibit A**. Seeing this need in the community, Nathan created “Renegades 4 Christ,” or “R4C,” “a fitness-based youth mentorship program designed to help inspire, grow, and train young people” throughout the Billings community. *Id.* The program challenged young people to “become the best version of themselves” through connection with others that pushed them to “live a disciplined and more purposeful life.” (Leonard Zito Character Letter.) Nate has impacted hundreds of kids through this program and has “led discussions with our community’s youth that have left an everlasting positive impact on their lives.” (Justen Shaw Character Letter.) Nathan’s work with R4C even inspired his brother, Leonard, to start a similar fitness-based mentorship program in Arizona. (Leonard Zito Character Letter.)

Nathan took interest in teaching some of the lessons taught in R4C and translating them into lessons that could be taught in local schools.

He arranged meetings with the Elder Grove Elementary School Principal, Jesse Moore, where the two “came up with a plan where students helped take ownership of their school.” (Jesse Moore Character Letter.) Inspired by his meeting at the school, Nathan ran for and won a seat on the school board. There, Nathan “built strong relationships with the other members of the board” and “found opportunities to serve [the school district] and never asked for recognition from anyone.” (Jesse Moore Character Letter.) As a board member, Nathan never failed to “put kids first in all of his discussions,” and “did whatever he could to support [the] administration, school board, staff, and community.” (Jesse Moore Character Letter.)

Nathan’s selflessness and desire to give back has manifested itself in other notable ways. Nathan coaches his daughter’s soccer team, participates in community-based faith support groups, and even organized a group of friends to donate blood every two months. (Michael Hill Character Letter.) Simply put, Nathan is “the kind of person that would give the shirt off of his back to his worst enemy.” (Mark Beddes Character Letter.)

Nathan enjoys tremendous support in the community, even in light of his offense. Those people who know him best know that this behavior was completely out of character, and that nothing like it will happen again. Nathan's family, his neighbors, his friends, his friends' parents, his in-laws, his employees, his bankers, and even his insurance agents have written letters on his behalf. In the over 60 character letters submitted to counsel on his behalf, it is clear that the community as a whole feels that Billings is "a better, safer, and more enjoyable place with Nate in it." (Brian Barrett Character Letter.)

Nathan takes full responsibility for his actions and recognizes the harm he caused by not living up to the principles he expects of himself. The repercussions of his offense will follow him for the rest of his life. As Amber puts it, "he has suffered a loss of his confidence, livelihood, and at times this has completely overwhelmed him." (Amber Zito Letter.) The "sorrow that Nathan feels for this is immeasurable and it is just a drop in the bucket in comparison to the outcome this decision will have on the many lives that Nathan has impacted and will continue to impact." (Mark Beddes Character Letter.)

C. The kinds of sentences available to the Court.

In some instances, probation instead of prison better promotes respect for the law. “A sentence of imprisonment may work to promote not respect, but derision of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.” *Gall vs. United States*, 552 U.S. 38, 54 (2007). (quoting district court opinion).

The Supreme Court noted in *Gall* that “[p]robation is not granted out of a spirit of leniency,” and, “probation is not merely ‘letting an offender off easily,’” 552 U.S. at 49 n.4 (citing Advisory Council of Judges of National Council on Crime and Delinquency, *Guides for Sentencing* 13-14 (1957)). The Supreme Court also stated “the probation or parole conditions imposed on an individual can have a significant impact on both that person and society Often these conditions comprehensively regulate significant facets of their day-to-day lives They may become subject to frequent searches by government officials, as well as to mandatory counseling sessions with a caseworker or psychotherapist.” *Id.* at 48-49 (citing 1 N. Cohen, *The Law of Probation and Parole* § 7:9 (2d ed. 1999) (brackets omitted)).

Nate will face significant personal impacts from a probationary sentence, including strict supervision and constraints on his freedom. He will face scrutiny of his financial and business affairs, and be subject to routine searches of his person, home and vehicles. His ability to freely travel and live life as a regular citizen will be curtailed. He can no longer vote or sit on a jury. He will have to frequently check in with his probation officer and comply with all requests. A probationary sentence is not “letting Nate off easy.” It is the proper sentence in this case and under these circumstances.

D. The need to avoid sentencing disparities.

While antitrust convictions are rare in this district, sentences imposed on other Montana defendants convicted of federal financial crimes in the Billings division show that sentencing Nathan to probation would not be disparate with other offenders.

Tanya Smith (CR 20-81-BLG-SPW) was convicted of Theft of Government Property in a Social Security Fraud case that involved a loss amount of \$325,000.00. Ms. Smith’s guideline range was 18-24 months. She was sentenced to three years of probation.

Zach Ruble (CR 19-60-BLG-DLC) was convicted of conspiracy to commit wire fraud. With a 1.5 million-dollar loss amount, Mr. Ruble's guideline range was 33-41 months. Mr. Ruble was sentenced to probation for two years.

Meredith McConnell (CR 19-90-BLG-SPW) was convicted at trial of Theft from Federally Funded Program, Wire Fraud and False Statements. Ms. McConnell's sentencing guideline range was 12-18 months. Ms. McConnell was sentenced to four years of probation.

Nathan faces a guideline range of 6-12 months, lower than all of the cases above where probation was imposed. A probationary sentence here would not result in disparate treatment of similarly situated individuals, especially considering that in each of the cases above, there were identifiable victims who suffered pecuniary loss.

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E. The sentencing guidelines encourage the Court to impose a sentence other than incarceration.

Nathan's advisory guideline range is in Zone B of the Sentencing Table, which allows probation under the guidelines. PSR, ¶ 60. A 2018 application note to USSG 5C1.1 directs that "If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment[.]" *USSG 5C1.1*, Application Note 4.

This recent application note was motivated by a 2017 "recidivism study which showed that (i) defendants with zero criminal history points have a lower recidivism rate than those defendants with even one criminal history point and (ii) those defendants with zero criminal history points *and* no prior contact with the criminal justice system have an even lower recidivism rate." T. Hutchison, *et al.*, *Federal Sentencing Law and Practice*, 1358-1359, (2022 Edition).

Nathan fits squarely within this guideline directive. He has zero criminal history points and has had no prior contact with the criminal justice system; that is, no juvenile adjudications, no convictions, no other criminal conduct, no pending charges, and no arrests. A probationary

sentence is authorized and encouraged by the sentencing guidelines under these circumstances, especially considering that despite never interacting with the criminal justice system, Nathan promptly accepted responsibility and reached a pre-indictment resolution with the Government, which is reflective both of his character and his intention to never find himself in this position again in any court.

F. A prison sentence is greater than necessary to promote respect for the law, to punish and deter, and to protect the public.

A guideline prison sentence is not necessary here to promote respect for the law. As discussed above, a probationary sentence in this case promotes respect for the law because such a sentence recognizes the totally law-abiding manner that Nathan has lived his life, and accounts for his admirable personal history and characteristics discussed above.

Further, Nathan has already suffered significant punishment because of his offense. After spending the better part of his life building his business, Nathan recognized that the nature of the charges here made his association with Z & Z untenable. Last year, Nathan voluntarily disassociated from the company he dedicated his life to building and entered into voluntary exclusions with the State of Montana and the U.S.

Department of Transportation, which bar him from participating in any publicly funded highway projects for years. As a result, this conviction has ended the only career Nathan has ever known and caused him significant personal and professional humiliation.

The government will likely contend that a guideline prison sentence is necessary to generally deter others. Nathan contends that the very public nature of this prosecution, the loss of his career and business, and being permanently branded a felon will serve to generally deter others. Finally, it is undisputed that Nathan is not a dangerous person or repeat offender, meaning that prison is not necessary to protect the public.

CONCLUSION

Nathan is a first-time non-violent offender. He has accepted responsibility for his offense and poses no risk to the community. Nathan is eligible for probation, and the guidelines encourage the court to consider a sentence other than imprisonment for him. Nathan has been severely punished by this conviction alone—he has lost his business, his career, and had his good reputation permanently tarnished. Prison is not necessary to protect the public, or to deter Nathan or others. A

community-based sentence would adequately further the statutory purposes of sentencing. Nathan asks that this Court sentence him to probation with appropriate conditions.

DATED this 10th day of February, 2023.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Peter F. Lacny
Peter F. Lacny
Attorney for Nathan Nephi Zito

CERTIFICATE OF SERVICE

L.R. 5.2(b)

I, Peter F. Lacny, attorney for Defendant, hereby certifies that a copy of the Defendant's Sentencing Memorandum was served on these persons by the following means:

- 1, 2 CM/ECF
- Hand Delivery
- Mail
- Overnight Delivery Service
- Fax
- 3,4 Email

1. Clerk, U.S. District Court;
2. Bryan Dake and Jeremy Goldstein, U.S. Attorney's Office;
3. U.S. Probation Office;
4. Nathan Nephi Zito.

DATED this 10th day of February, 2023.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Peter F. Lacny
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Attorney for Defendant NATHAN NEPHI ZITO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATHAN NEPHI ZITO,</p> <p style="text-align: right;">Defendant.</p>	<p>Cause No.: CR 22-113-BLG-SPW</p> <p style="text-align: center;">DEFENDANT'S RESPONSE TO GOVERNMENT'S SENTENCING MEMORANDUM</p>
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NATHAN NEPHI ZITO, by and through counsel, hereby responds to the Government's sentencing memorandum.

The Government's Sentencing Memorandum

The government's Sentencing Memorandum cites four cases that they argue support a prison sentence. (Doc. 17 at 11). None of the cases cited are from the District of Montana. Three of the four cases appear to have had advisory guideline ranges higher than Nathan's. In the fourth case, the Defendant was a Criminal History Category II.

In *United States vs. Langan*, the defendant pleaded guilty to an antitrust crime as well as wire fraud. *Langan's* crimes involved bid rigging and fraud in the Connecticut construction industry. The government's sentencing memorandum in that case indicates that the probation office calculated *Langan's* advisory guideline range at 33-41 months. Langan received a sentence of one year and a day, a significant variance from the PSR's guideline range as outlined by the government.

United States vs. Aiyer involved price fixing and bid rigging in foreign currency exchange markets. The case was prosecuted in the Southern District of New York. Aiyer was convicted at a three-week jury trial. According to the government's sentencing memorandum, the PSR calculated his guideline range at 37-46 months. Even after losing at trial,

Aiyer was sentenced well below the apparent guideline range to eight months in prison.

In *United States vs. Dip* (Southern District of Florida), the defendant pleaded guilty to an antitrust offense related to price fixing in the freight forwarding industry. Dip's guidelines were higher than Nathan's, at 18-24 months. Unlike Nathan, Dip was not in *Zone B* of the Sentencing Table, and his guidelines did not encourage the court to consider sentences other than imprisonment. Dip was sentenced to 18 months.

United States vs. Diaz involved bid rigging at real estate foreclosure sales in California. The government's sentencing memorandum showed that *Diaz* faced an advisory guideline range of 6-12 months. While *Diaz* received a minor role enhancement, *Diaz* also had a Criminal History Category of II. Nathan has no criminal history and zero criminal history points under the guidelines.

Nathan's case is distinguishable from all of the above. Nathan's advisory guideline range is lower than three of the four cases cited by the government. While *Diaz's* guideline range was the same as Nathan's,

Diaz also was also a criminal history category II. A full consideration of all the 3553(a) factors support probation for Nathan.

DATED this 17th day of February, 2023.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Peter F. Lacny
Peter F. Lacny
Attorney for Nathan Nephi Zito

CERTIFICATE OF SERVICE

L.R. 5.2(b)

I, Peter F. Lacny, attorney for Defendant, hereby certifies that a copy of the Defendant's Resposne was served on these persons by the following means:

1, 2 CM/ECF
 Hand Delivery
 Mail
 Overnight Delivery Service
 Fax
3,4 Email

1. Clerk, U.S. District Court
2. Bryan Dake and Jeremy Goldstein, U.S. Attorney Office
3. U.S. Probation Office
4. Nathan Nephi Zito

DATED this 17th day of February, 2023.

By: /s/ Peter F. Lacny
Peter Lacny

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6
7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
8 BILLINGS DIVISION

9 UNITED STATES OF AMERICA,)
)
10 Plaintiff,)
vs.) Case No: CR-22-113-BLG-SPW
11)
) Sentencing
12 NATHAN NEPHI ZITO,)
)
13 Defendant.)

14
15 TRANSCRIPT OF PROCEEDINGS
Wednesday, March 29, 2023
16 3:30 p.m. to 4:22 p.m.

17
18 BEFORE THE HONORABLE SUSAN P. WATTERS
UNITED STATES DISTRICT COURT JUDGE
19 FOR THE DISTRICT OF MONTANA - BILLINGS DIVISION

20 James F. Battin Federal Courthouse
Snowy Mountains Courtroom
21 2601 2nd Avenue North
Billings, Montana 59101
22

23
24 Proceedings recorded by machine shorthand
25 Transcript produced by computer-aided transcription

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APPEARANCES

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1 AFTERNOON SESSION, WEDNESDAY, MARCH 29, 2023

2 (Whereupon, the court convened at 3:30 p.m., with
3 Defendant present, and the following proceedings were had:)

4 THE CLERK: All rise. The United States District
5 Court for the District of Montana is now in session. The
6 Honorable Susan P. Watters presiding.

7 THE COURT: Amanda, would you please call the matter
8 on the calendar.

9 THE CLERK: Yes, Your Honor.

10 The Court has set aside this time to hear the matter
11 of CR-22-113-BLG-SPW, USA vs. Nathan Nephi Zito. This is the
12 time set for a sentencing.

13 For the record, Bryan Dake appears on behalf of the
14 government; Peter Lacny appears on behalf of the defendant;
15 and the defendant is present. I have received and reviewed
16 the presentence report, the sentencing memoranda filed by
17 counsel, the letters of support, and exhibits that were
18 filed.

19 And, Mr. Dake, did you receive and review the
20 presentence report?

21 MR. DAKE: I have, Your Honor. And one point of
22 clarification, Your Honor, I just wanted to introduce the
23 Court to Jeremy Goldstein, he is an attorney with our
24 antitrust division for the Department of Justice.

25 THE COURT: Nice to meet you, Mr. Goldstein.

1 MR. GOLDSTEIN: Nice to meet you as well.

2 MR. DAKE: I'll be handling our preliminary portion,
3 Your Honor, and then Mr. Goldstein will be making the
4 argument on behalf of the United States.

5 THE COURT: Okay.

6 MR. DAKE: And to the Court's question, I have
7 reviewed a copy of the presentence report.

8 THE COURT: And do you have any objections to that
9 report?

10 MR. DAKE: No, Your Honor.

11 THE COURT: Okay. Thank you. Oh, I'll ask you one
12 more question before you sit down. Are you recommending that
13 the defendant's offense level be decreased by two levels for
14 acceptance of responsibility?

15 MR. DAKE: The government makes that recommendation,
16 Your Honor.

17 THE COURT: And that recommendation is granted.

18 Mr. Lacny, did you receive at that review the
19 presentence report?

20 MR. LACNY: I have, Your Honor.

21 THE COURT: And did you have an opportunity to go
22 through that report in its entirety with Mr. Zito?

23 MR. LACNY: We have, Your Honor.

24 THE COURT: Do you have any objections to that
25 report?

1 MR. LACNY: We have no objections to the PSR, Your
2 Honor.

3 THE COURT: Okay. Thank you.

4 Am I pronouncing your name correctly, sir, Zito?

5 THE DEFENDANT: Zito.

6 MR. LACNY: Zito, Your Honor.

7 THE COURT: Thank you.

8 MR. LACNY: No problem.

9 THE COURT: So I will rely on the presentence
10 investigation report for purposes of calculating the advisory
11 sentencing guidelines. I will accept the plea agreement that
12 has been filed in this case, which includes a full appeal
13 waiver and an agreed-upon fine of \$27,000, which I understand
14 that Mr. Zito will be paying today; correct?

15 MR. LACNY: That's correct, Your Honor.

16 THE COURT: Okay. So now I will summarize the
17 applicable punishments for the offense under both the United
18 States Sentencing Guidelines and the applicable statute.

19 With regard to the guidelines, the adjusted offense
20 level is 12. We arrive at that by beginning with a base
21 offense level of 12, subtracting -- or adding one level for
22 the reason that there was an agreement to submit
23 noncompetitive bids, adding two more levels for the reason
24 that the volume of commerce attributable to the defendant was
25 2,700,000, and then subtracting three levels for the reason

1 that this is attempted monopolization, and it was not fully
2 completed. Then, subtracting two levels for acceptance of
3 responsibility, we arrive at a total offense level of 10.

4 Mr. Zito has zero criminal history points so his
5 criminal history category is I. The resulting advisory
6 guideline range is 6 to 12 months' imprisonment. Under the
7 guidelines, Mr. Zito is eligible for probation for a period
8 of one to five years. He is subject to one to three years of
9 supervised release, a fine of 4,000 to \$1 million, and a
10 special assessment of \$100, and restitution is not applicable
11 under the guidelines.

12 Pursuant to the statute for the charge of attempted
13 monopolization in violation of 15 United States Code Section
14 2, the maximum punishment is ten years imprisonment, the
15 maximum fine is \$1 million, no more than three years of
16 supervised release, and the \$100 special assessment.

17 Under the statute, Mr. Zito is eligible for
18 probation for a period of one to five years, and again
19 restitution is not applicable.

20 And, Mr. Dake, are you going to answer this
21 question?

22 MR. DAKE: Yes, Your Honor.

23 THE COURT: Do you agree that's an accurate
24 statement of the statutory and guideline provisions?

25 MR. DAKE: It is, yes, Your Honor.

1 THE COURT: And do you agree, Mr. Lacny?

2 MR. LACNY: I agree, Your Honor.

3 THE COURT: Okay. And we have got a lot of people
4 in the courtroom here today, and there were lots of letters.
5 I didn't see that you indicated you had anyone that wished to
6 testify or make a statement today.

7 MR. LACNY: I have no testimony, Your Honor. I'd
8 stand on the letters as submitted.

9 THE COURT: Okay. Thank you.

10 MR. LACNY: Thank you.

11 THE COURT: So, Mr. Goldstein, you may be heard as
12 to sentencing.

13 MR. GOLDSTEIN: Thank you, Your Honor.

14 And, again, Jeremy Goldstein from the antitrust
15 division for the United States. I want to begin by
16 discussing Mr. Zito's conduct in this case. I'll then turn
17 to the Section 3553 factors, why the government believes that
18 a nine-month term of imprisonment is appropriate.

19 Mr. Zito is in court today because he tried to
20 cheat. For years he has competed for publicly funded highway
21 projects, and his company has won dozens of those projects
22 over time. But Mr. Zito was not content to compete for those
23 projects fairly. He was not content to compete on the basis
24 of price or on the basis of work quality.

25 Instead, he spent nine months, nine months doggedly

1 pursuing a deal to illegally divide crack sealing markets
2 with a competitor all for the purpose of eliminating
3 competition and ultimately increasing his company's profit
4 margins.

5 The conduct here is fairly straightforward.
6 Mr. Zito proposed that his competitor abandon the Montana and
7 Wyoming markets. In return, Mr. Zito promised to cede the
8 South Dakota and Nebraska markets. Mr. Zito then offered
9 \$100,000 to sweeten the deal. That conduct alone is illegal
10 and warrants a stiff jail sentence, but several things here
11 make Mr. Zito's conduct substantially worse.

12 First, Mr. Zito went to great lengths to disguise
13 his conduct from law enforcement. He proposed a sham
14 transaction to make the \$100,000 payment that he was going to
15 pay to his competitor appear legitimate.

16 Under his proposal the \$100,000 would be documented
17 as a payment for construction equipment, even though the
18 specific equipment included in the deal was going to be junk.
19 There was no question that Mr. Zito knew it was junk. It was
20 his idea. He suggested the equipment be, quote, a broken
21 down kettle in the yard or something that is going to waste,
22 end quote. It didn't matter because the equipment was just
23 cover for a payment that he had negotiated for a very
24 different purpose.

25 Second, Mr. Zito has reached or attempted to reach

1 similar agreements with other competitors. He's a repeat
2 player. In two other cases Mr. Zito deployed an identical
3 playbook. He approached a competitor for highway crack
4 sealing projects unsolicited. He proposed that the
5 competitor exit the market in Montana and Wyoming and in
6 return he committed to a substantial payment as compensation.

7 In one of those two cases, Mr. Zito appears to have
8 been successful. The company entered an agreement and exited
9 the market, leaving Mr. Zito and his company in a stronger
10 position to monopolize what was left.

11 Third, Mr. Zito did not need to cheat. Paragraph 51
12 of the PSR makes clear this is not the case of a failing firm
13 or a desperate man. Mr. Zito and his company were
14 successful. Mr. Zito just wanted to be more successful.
15 Mr. Zito was rich. Mr. Zito just wanted to be richer.

16 At the end of the day, Mr. Zito's conduct is exactly
17 the type of conduct that federal antitrust laws are designed
18 to prevent. Had Mr. Zito succeeded here, he would have faced
19 less competition or in some cases no competition in Montana
20 and Wyoming.

21 With few or no other bidders for these projects,
22 states' departments of transportation, and ultimately
23 taxpayers, would have little choice but to work with Mr. Zito
24 and his company leaving him better able to raise prices for
25 his services.

1 The harm that could have occurred here is
2 substantial. That is why even a failed attempt to achieve
3 monopolization is prohibited by the Sherman Act and treated
4 as a felony.

5 Let me turn now to the 3553(a) factors. My -- the
6 government believes they support a nine-month term of
7 imprisonment. The first factor is the seriousness of
8 Mr. Zito's offense. Antitrust offenses are, by their nature,
9 serious. For over a century, federal law has prohibited
10 competitors from agreeing to fix prices, rig bids, or
11 allocate markets.

12 As the guidelines recognize, those agreements,
13 quote, cause serious economic harm, and they, quote, serve no
14 purposes other than to restrict output and raise prices. And
15 it's not just the guidelines that recognize the seriousness
16 of what Mr. Zito did here. Within the industry these types
17 of agreements are widely known to be illegal and harmful.

18 The Montana and Wyoming Departments of
19 Transportation both include anti-collusion statements in
20 every one of their bid packages. Consistent with federal
21 law, those statements require each and every bidder to attest
22 that they are not parties to restrictive agreements, and
23 their bids are not the product of collusion.

24 Look, too, at the actions of Mr. Zito's competitor,
25 that is the gentleman who cooperated in this case. Compare

1 their actions. Recall that Mr. Zito approached him to
2 propose a strategic partnership, and the competitor
3 immediately turned and reported his outreach to federal
4 authorities. There was no ambiguity for him because as the
5 competitor knew, and as Mr. Zito knew, the agreement that was
6 being proposed was collusive and it was illegal. His conduct
7 here is serious, and it warrants a term of imprisonment.

8 The second factor supporting a term of imprisonment
9 is Mr. Zito's history and characteristics. As I said at the
10 outset, Mr. Zito has been a successful contractor for several
11 years. As the PSR makes clear, he has a comfortable life
12 with a good deal of wealth, and he is recognized within the
13 community as a successful businessman.

14 That's important here because he -- it means that
15 Mr. Zito did not need to cheat. He did not need to engage in
16 this misconduct. He was already successful. He was already
17 rich. This is about him trying to make more money with less
18 work.

19 Listen to defendant's own words. Mr. Zito was asked
20 by his competitor on a recorded call if he was, quote,
21 looking for certain territories or certain areas so it limits
22 competition, end quote. Mr. Zito responded, quote, if we
23 weren't fighting over Wyoming the margins would go up to a
24 much more livable wage, end quote. "The margins would go up
25 to a much more livable wage."

1 He admits this is about profit margins. This is
2 about making even more money. And, again, take a look at
3 paragraph 51 of the PSR, Mr. Zito appears to have a very
4 different definition of a livable wage than most people that
5 I know.

6 Similarly, Mr. Zito later said on a different call,
7 quote, I feel really like you guys are the only ones that can
8 compete with us. So I guess I would much rather get along
9 with you guys in particular and come to some sort of
10 agreement than butt heads. I'd much rather get along and
11 come to some sort of agreement than butt heads. In his own
12 words, this is about avoiding competition and making more
13 money predictably and easily.

14 I want to take a moment to quickly respond to some
15 of the points that Mr. Zito raised in his sentencing memo.
16 First, Mr. Zito said that his behavior here was, quote,
17 completely out of character. Respectfully, I disagree. This
18 offense, I believe, tells you exactly who Mr. Zito is.

19 In public, Mr. Zito is a devoted father and son. He
20 is active in the community, but there is a different side to
21 Mr. Zito. One that behind closed doors, when no one is
22 looking, is eager to cut corners and cheat for his own
23 material gain. That side of Mr. Zito is one to lie and
24 deceive to hide his conduct, just so that he can make money
25 with less effort.

1 I read through the letters submitted on Mr. Zito's
2 behalf. One said that Mr. Zito, quote, has never been
3 motivated for his personal gain. How does that square with
4 Mr. Zito's actions in this case? Because on those calls,
5 those recorded calls, when no one else was supposed to be
6 listening, Mr. Zito seemed plenty motivated by material gain.

7 Another letter said that Mr. Zito has, quote, great
8 respect for the law. Again, how does that comport with
9 Mr. Zito's actions here? Behind closed doors he showed a
10 disrespect for federal law, and by trying to hide his
11 actions, a disregard for law enforcement.

12 Another letter said that Mr. Zito is honest and
13 always transparent, but then how do you explain the sham
14 transaction at issue in this case? Mr. Zito has shown
15 himself willing to lie and to deceive to hide a crime.

16 Second, Mr. Zito says in a sentencing memo that this
17 offense was a complete aberration. Again, I respectfully
18 disagree. This is not a one-time act. Mr. Zito cold-called
19 his competitor and then called again and again and again to
20 try to negotiate this deal. They had over a dozen reported
21 calls over the course of nine months.

22 Mr. Zito fought for this, and he was not willing to
23 take no for an answer. This is not an aberration, and of
24 course this is not an aberration because Mr. Zito has engaged
25 in this conduct before on three occasions with three

1 different competitors. He tried to divide markets and on two
2 occasions he tried to cover his tracks with some sort of sham
3 transaction. This offense tells you exactly who he is.

4 The third factor supporting a term of imprisonment
5 is the need to adequately deter criminal conduct. This is a
6 white collar case, and with white collar criminals, the
7 single best deterrent is a jail sentence. Let me raise two
8 important points that I believe are unique to this situation.

9 First, the need to general deterrence in this case
10 is substantial. Bid-rigging in market allocations schemes
11 are difficult to detect, and they are difficult to prosecute,
12 especially in consolidated markets like the ones at issue
13 here. These crimes tend to involve secret agreements between
14 individuals who are very motivated to conceal their actions.
15 They can happen entirely behind closed doors, and they can be
16 very easy to hide.

17 Look at the facts of this case. With so few
18 competitors, all Mr. Zito had to do to effectively monopolize
19 the Wyoming market was convince one competitor to exit the
20 market; and then to hide his conduct, all he had to do was
21 draft a single sham agreement.

22 Efforts like those to evade law enforcement make
23 identifying and cracking down on these agreements even more
24 difficult. A prison term for Mr. Zito would deter him and
25 others from engaging in this conduct again.

1 Second, general deterrence in this market at this
2 time is especially important. Under recent legislation
3 billions of federal dollars are being allocated to the states
4 for infrastructure projects. Billions of dollars. That sum
5 of money is going to be a gigantic target for bad actors
6 looking to make a quick buck very easily.

7 A significant prison term for Mr. Zito will send a
8 message that collusive and illegal practices will not be
9 tolerated and will be punished appropriately. Make no
10 mistake, this case is being monitored within the industry.
11 Other potential competitors are reading the papers, and they
12 will note what punishment Mr. Zito receives.

13 The fourth and final factor supporting term of
14 imprisonment is the need to avoid sentencing disparities. As
15 the government explained in its sentencing memo, individuals
16 like Mr. Zito routinely receive prison sentences for
17 violating federal antitrust laws. We'll return to that in a
18 minute.

19 Mr. Zito says in his sentencing memo that white
20 collar defendants in this district routinely receive
21 probation, even when their guideline range was higher than
22 what the guidelines suggest for Mr. Zito here. But those
23 were different crimes, and they involve different defendants.
24 Mr. Zito's conduct here reached well beyond the district
25 affecting bids in four states.

1 Mr. Zito also notes that he does not have a criminal
2 background, but that's true of almost every person who
3 violates the federal antitrust laws. These are not crimes
4 committed by people who have lengthy criminal records.

5 Finally, Mr. Zito suggests there are no identifiable
6 victims, no one actually suffered a pecuniary loss. But the
7 guidelines already account for that. Mr. Zito received a
8 three-point reduction because his attempt to monopolize was
9 not successful. He is not entitled to additional
10 compensation.

11 In sum, the guidelines here get things right. The
12 guidelines start with a base offense level using volume of
13 effective commerce. The guidelines then give Mr. Zito a
14 one-point enhancement because his offense involved an attempt
15 to rig bids.

16 It then reduces his offense level by three points
17 because he attempted but did not succeed in monopolizing his
18 markets. And after all that, the guidelines still landed at
19 a guideline range of 6 to 12 months.

20 Let me end with a quote from the guidelines on this
21 topic. Quote, under the guidelines, prison terms for these
22 offenders should be much more common and usually somewhat
23 longer than typical under pre-guidelines practice. Absent
24 adjustments, the guidelines require some period of
25 confinement in the great majority of cases that are

1 prosecuted, including all bid-ridden cases. Again, in this
2 instance the guidelines got it right.

3 In sum, Mr. Zito's conduct in this case is
4 substantial, and we respectfully ask this Court to punish him
5 appropriately by imposing a nine-month term of imprisonment,
6 a \$27,000 fine, and three years supervised release.

7 Thank you.

8 THE COURT: Thank you.

9 Mr. Lacny.

10 MR. LACNY: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. LACNY: I ran across a quote from Senator
13 Cory Booker earlier this year, and he said that "Each of us
14 is more than the worse thing that we have done." That
15 concept is recognized by the 3553(a) factors.

16 And with all due respect to the government's
17 argument, they basically stood up here and talked about only
18 one factor, the nature and circumstances of the offense. And
19 we don't dispute that this is serious. We never have.

20 We understand the policy behind the antitrust laws,
21 why the rules exist. We admitted our violation of them.
22 We've never hid that. We've never said it's not serious. It
23 is significant that there is no pecuniary loss here to any
24 individual.

25 There's been no allegation whatsoever in these

1 crimes that the work from Z & Z Contracting was not done or
2 that it wasn't done on time or wasn't done appropriately;
3 nothing like that that is aggravating.

4 Furthermore, Mr. Zito did everything in his power to
5 make his violations of the antitrust laws right. Early on
6 when case agents came to interview him, he cooperated right
7 away without an attorney. He spoke to them. He cooperated
8 in a grand jury investigation, which lasted years. We turned
9 over thousands of documents, emails, text messages. We did
10 that cooperatively with the government.

11 We entered into pre-indictment plea discussions with
12 the government and ultimately a plea agreement where Mr. Zito
13 accepted responsibility. We do not diminish the seriousness
14 of this offense. We've done everything we can to make it
15 right, including agreeing to a fine that we're going to pay
16 in full today.

17 So, again, with all respect to the Department of
18 Justice's impassioned argument about the circumstances of the
19 offense, we understand they're serious, but that is but one
20 factor. All the other factors, Your Honor, point to a
21 probationary sentence being correct in this case.

22 Going back to Senator Booker's quote that "We're all
23 more than the worse thing we have done," you've seen by the
24 letters I've submitted on Nathan's behalf, you see about the
25 rows filled up with supporters here supporting Nate, you've

1 seen by the comments in my sentencing memo, and the articles
2 I submitted as exhibits to that memo that Nathan Zito is way
3 more than this offense.

4 And if the good way this man has lived his life the
5 entire time up until this crime means anything, it needs to
6 mean something today. He is 44 years old. He grew up here
7 in Montana in the Bitterroot Valley in a very poor family,
8 kind of Horatio Alger story of starting a business and
9 growing that business through hard work.

10 Many, many loyal employees he employed through the
11 years. And like I say, grew that business on his own with
12 the help of his brother. Eventually moved to Billings where
13 the business really took off. Nate's married with five kids,
14 who I can tell you are his absolute world. I've spent a lot
15 of time with Nate over the last year and a half, and his
16 dedication to his family, and in particular those five kids,
17 is probably the hardest part for him in going through this
18 process.

19 He shared with me and the probation officer during
20 the PSI interview the difficulty of sitting down and having
21 to look his children in the eye and tell them that he had
22 committed an offense, that he was going to have to be held
23 accountable for that. And that that was very difficult for
24 him, and that speaks to his character.

25 He shared with them that he might be facing a prison

1 sentence. And, again, I can't imagine having to have that
2 conversation with your kids, and I think Nate would tell you
3 that's the hardest thing he has had to do in this case.

4 I won't belabor the letters of support. I know you
5 read them. They come from people all around the community,
6 from former employers to business associates, to friends,
7 family, high school friends. And all of them have the
8 central theme that this is a man with core integrity, a man
9 with no criminal history, no violent tendencies, no
10 indication at all that this whole process is not and will not
11 specifically deter him.

12 I frankly can't think of another case where I've
13 submitted and received so many letters on behalf of a
14 defendant; in 16 years it's the most I've had. I told Nate
15 at the beginning of the case that he is going to find out who
16 his friends are, in terms of who sticks with him by this.
17 And by all accounts, Mr. Zito has a lot of loyal friends who
18 recognize him, who are here to support him today and believe
19 in him, and they know about the offense, and that's important
20 too.

21 You know, the government pointed out some quotes in
22 the letters trying to impeach his character, but in every one
23 of those letters, these letter writers noted that Mr. Zito
24 accepted responsibility for what he did. He didn't shirk
25 that or minimize it. That's important and that's significant

1 going forward. It tells you, again, what type of person
2 Mr. Zito is.

3 I talked in my sentencing memo about Mr. Zito's
4 volunteer work through his life, and that is not some type of
5 courthouse conversion, Your Honor. That's been a big part of
6 Mr. Zito for years. He started R4C, which is a youth
7 leadership training program. Hundreds of kids have
8 benefitted from that program that went through it; some of
9 them are in the courtroom here today now supporting Mr. Zito.

10 And that program is talked about at length in the
11 Cliffside Neighbors article that I submitted with my
12 sentencing memo. Nate served on his kids' school board.
13 And, again, according to the principal and other board
14 members, was an ardent advocate for the kids, for the
15 teachers, for the school. I'm sure the Court knows that
16 serving on a school board can be a somewhat thankless job at
17 some times so, again, that speaks to Nate's dedication to
18 doing good, to giving back.

19 One note in one of the letters particularly sticks
20 out to me. It was at the bottom of one of the paragraphs,
21 and I can't remember the writer now, but he noted Mr. Zito
22 has organized a group of friends to go and give blood every
23 two months to the American Red Cross.

24 And that is just, to me, a small point, but it just
25 shows how selfless that Mr. Zito truly is. This is a person

1 that respects the law, that does not need prison or anything
2 like it to further his respect for the rules.

3 I know the government stood up here and in talking
4 about the offense focused on the factors punishment and
5 deterrence, and I understand those are factors that the Court
6 must consider. Mr. Zito has been punished by this process
7 alone, and he will be punished by a probationary sentence.

8 The Supreme Court is clear that probation is not
9 letting someone off easy, that it is real punishment. He is
10 going to suffer the indignities of having his home, his car,
11 his workplace open to random searches by probation office, he
12 won't be able to travel, he will be closely monitored. That
13 is not fun. That is not easy. It is real punishment.

14 Setting aside whatever sentence the Court may hand
15 down, this process alone has significantly punished Mr. Zito.
16 Rightly or wrongly, Your Honor, so much of our identities are
17 caught up in what we do for work, and I think the government
18 attorneys would agree with me that if our bar cards or our
19 ability to practice law were taken from us, that punishment
20 is profound and real.

21 And it takes away your ability to make a livelihood,
22 takes away your sense of worth, and it takes away something
23 you worked towards for years. And as a result of his actions
24 and as a result of this case, Mr. Zito lost his career. He
25 had to extract himself from his company pursuant to

1 requirements from Department of Highways, and he can't go
2 back into the company anytime in the near future and, likely,
3 Your Honor, even if he did, it's not likely he would be
4 successful in the industry just due to this conviction.

5 So, again, that is a huge portion of punishment to
6 process alone. Putting Mr. Zito in prison for nine months to
7 me, Your Honor, seems piling on. The government said the
8 guidelines get this one right, and they go on to quote a 1987
9 guideline note saying that antitrust offenders should go to
10 prison.

11 And it's rare that I do agree with the guidelines in
12 a lot of cases, but here the guidelines specifically allow
13 probation; in fact, they recommend it. Application note
14 5C1.1 says the defendant is a nonviolent first-time offender,
15 and their ranges in Zone A or Zone B of the sentencing table,
16 the Court should consider imposing a sentence other than
17 imprisonment.

18 That's from a 2017 review where the sentencing
19 commission looked at a study that found those people that are
20 nonviolent first-time offenders have essentially zero risk of
21 re-offending. And with guidelines so low, my request here,
22 Your Honor, is one for a very small variance.

23 As indicated in my sentencing memo, this requested
24 sentence is not disparate at all. I know the Court has read
25 my response to the government's sentencing memo where I noted

1 the substantial differences in conduct between the antitrust
2 cases the department cites, and the facts and the guidelines
3 in Mr. Zito's case. Every one of those defendants had much
4 higher guideline ranges, and not a single one of them, except
5 for one individual in Criminal History Category II, received
6 a guideline sentence.

7 In sum, Your Honor, my request for probation is a
8 very minor request for a variance. It's supported by the
9 3553(a) factors. No question Mr. Zito committed a crime. We
10 understand it's serious. But by losing his career, by
11 harming his reputation forever, he's paid a lot for these
12 crimes already.

13 He has been punished for them and he will continue
14 to be punished if the Court follows my recommendation and
15 puts him on probation. It's the appropriate sentence here,
16 Your Honor, in my view.

17 Thank you.

18 THE COURT: Thank you.

19 And, Mr. Zito, do you have anything you wish to say
20 before I impose sentence?

21 THE DEFENDANT: Your Honor, I'm not a very good
22 public speaker so I tried to put everything that I wanted to
23 tell you in my letter, which I know you've read, and I hope
24 that you will give me a chance to stay in the community.

25 Thank you.

1 THE COURT: The question before the Court today is
2 what is a sufficient but not greater than necessary sentence
3 that will accomplish the purposes of sentencing which include
4 punishment, deterrence, protection of the public, and your
5 rehabilitation. And the sentence needs to reflect the
6 seriousness of the crime and promote a respect for the law.

7 In determining what is a sufficient but not greater
8 than necessary sentence, I consider not only the advisory
9 sentencing guideline range but also the sentence provided for
10 by statute and the sentencing factors that are set forth in
11 18 United States Code Section 3553(a).

12 And I think the biggest question I have for you,
13 Mr. Zito, is why? You were very successful. Why did you
14 come up with this idea? Why did you think this was a good
15 idea?

16 THE DEFENDANT: I just got overaggressive and took
17 it too far. I should have known better. I -- I -- I was
18 looking for an opportunity, and I thought that was a good
19 one, but I was wrong. I...

20 THE COURT: Your business had been successful up to
21 that point, hadn't it?

22 THE DEFENDANT: Yeah. Yeah, it took a long time,
23 Your Honor, but it got there.

24 THE COURT: So do you agree with the government's
25 characterization that really there doesn't seem to be any

1 explanation for your conduct other than wanting to increase
2 your profits illegally? Is there any other explanation?

3 THE DEFENDANT: My thought processes were different
4 at the time, and I wasn't thinking of it in that way. It
5 was -- for me it was more like do we really want to fight
6 with each other? Or can -- and one of us goes out of
7 business -- or can we not? And at the time I didn't -- I was
8 not aware that that would be illegal.

9 THE COURT: Well, you were trying to, basically,
10 divvy up the market with this other company, right?

11 THE DEFENDANT: (Nod of head.)

12 THE COURT: You take Montana and Wyoming, and they
13 take Nebraska and -- was it one of the Dakotas? I can't
14 remember specifically.

15 THE DEFENDANT: South Dakota.

16 THE COURT: South Dakota, yes.

17 Well, I'm looking at the 3553(a) factors. We all
18 agree here in the courtroom that this is a serious offense.
19 I mean, there is certainly, we have, you know, the Sherman
20 Antitrust Act, and there is certainly plenty of public policy
21 that we can all imagine supports making this kind of conduct
22 criminal where businesses would be able to collude with each
23 other and enter into agreements that would squeeze other
24 people out.

25 That's not the situation here, but would amount to

1 having a monopoly and making it so that there was no
2 competition, and that then the consumer was at your mercy as
3 far as what you charge and what they have to spend in order
4 to get the services.

5 I mean, the public certainly benefits from that act
6 and from, you know, the antitrust arm of the government that
7 prosecutes these cases because the public, it is to their
8 detriment when businesses decide that they are going to
9 collude with each other and somehow increase their profits
10 to -- at the expense of the people who consume their
11 services.

12 And it is kind of a head scratcher, Mr. Zito,
13 because looking at the presentence report, as far as your
14 financial situation, that appeared to be -- to be in good
15 shape. I know you wrote in the financial portion of the
16 presentence report, you made a note that a lot of the monies
17 that you earned went back into the family business in order
18 to keep the family business going.

19 But it talks about, you know, the income that you
20 and your wife enjoyed, and so it seems you had a pretty
21 comfortable lifestyle. So it's a conundrum to me to
22 understand why you would have gotten yourself involved in
23 this, and at your initiation. It isn't that you got a phone
24 call from somebody else and you decided to enter into one of
25 these agreements with them.

1 You were the person initiating the call and pursuing
2 the agreement with the other company to divide up these
3 territories to both of your benefit. There is no doubt about
4 that. And the other person, the other guy, immediately
5 recognized that this was not allowed under the law, and that
6 you were -- what you were suggesting was illegal.

7 But then I look at who you are as an individual,
8 Mr. Zito, and your history and characteristics and, again,
9 there's no -- no real explanation for it. I know the
10 government argues that there were other incidences of this
11 occurring. I'm not sure about the timeline of those.

12 I guess I would suspect we're talking kind of about
13 the same timeline and so, again, what was going on then, I
14 don't really think I understand as to what motivated you to
15 do this. But up to this, you've got no criminal history,
16 and -- I mean, not even a traffic ticket is noted.

17 And you've got all of these letters of support, all
18 of which indicate your long contributions to the community
19 throughout your various -- the volunteering and the various
20 things you have done throughout the community over the years
21 to be a really valuable member of the community, and not just
22 law abiding, but a contributing member to our community.

23 And I think in looking at your history and
24 characteristics, and then this crime, I think that's the very
25 definition of aberration, frankly, Mr. Zito. And it's true,

1 with financial crimes, arguing that you have no criminal
2 history, no one ever does, frankly. And so it's almost a
3 nonstarter because people who get involved in these financial
4 crimes, for the most part, are otherwise law-abiding members
5 of their communities.

6 So how do -- how do we accomplish these purposes of
7 sentencing? I thought your letter of acceptance that's
8 included in the presentence report was very well written,
9 Mr. Zito. You're obviously very well spoken. It indicated
10 some retrospection, I mean, I think not uncommonly.

11 You talk about how the negative impact of this
12 crime, basically, on you and your family. Yes, and it's
13 unfortunate you didn't think about that before you committed
14 the crime. But there's also a level of acceptance of
15 responsibility in here that I think the Court needs to take
16 note of.

17 And in visiting with the presentence author, Officer
18 Arledge, unlike other white collar defendants, her impression
19 is that this has made a big impact on you. You weren't
20 trying to blame anyone else, make excuses for your conduct,
21 you've taken responsibility, and seemed to -- it has seemed
22 to have really humbled you as far as going through the
23 process of being involved with being charged and now
24 convicted of a federal felony offense.

25 And I think that the -- I mean, the guidelines and

1 the comments there, too, have changed over the years, and I
2 think that -- and that are thinking about punishment and what
3 sort of people need to be sent to prison has changed over the
4 years.

5 You know, we have the First Step Act. I remember
6 several years ago there was litigation -- or not litigation
7 but legislation, bipartisan legislation -- about, you know,
8 revamping the guidelines and reconsidering that we send a lot
9 of people to prison, the First Step Act, people got released
10 early from prison, and I think that's more where we are
11 today.

12 With an understanding, first of all, prison costs a
13 lot of money; and second of all, it's not for every one. The
14 primary purposes of sentencing, in my mind, are punishment so
15 that people are deterred from not only committing the same
16 crime but other crimes.

17 Most crimes don't have much of an aspect of general
18 deterrence; drug crimes or homicides or assaults, those kinds
19 of things. I do think there is some level of general
20 deterrence when it comes to white collar crimes because we
21 are dealing with, basically, a different kind of defendant.

22 But punishment for the purposes of deterrence and
23 then rehabilitation and protection of the public, and
24 protection of the public comes somewhat with incarceration,
25 but everybody -- almost everybody -- gets out, and we're not

1 talking about a lot of incarceration here. Rehabilitation is
2 a very important part.

3 But then looking at you, Mr. Zito, there isn't
4 really much in your background that indicates that we have a
5 real strong need of rehabilitation. Does it need to be
6 impressed upon you that what you did was a crime in that it
7 has, particularly if you had gone through with it, very
8 negative consequences in society? Yes.

9 Do we have someone who has significant substance
10 abuse issues, gambling issues, mental health issues, such
11 things like that, that we need to provide some really
12 specific programming to that may be offered in the Bureau of
13 Prisons or through supervision? Not really.

14 You have suffered some negative consequences of your
15 choices here through having to leave your business, having
16 been -- now I guess you're prevented from engaging in any
17 highway bids for the State of Montana for the next three
18 years. I guess you have agreed voluntarily that you would be
19 excluded from federal contracting jobs for at least another
20 five years after sentencing.

21 You have agreed to a pretty hefty fine, and that's
22 another thing that's quite common to these white collar
23 crimes is sometimes the best punishment is to hit them in the
24 pocketbook. But in looking at the 3553(a) factors, other
25 than to punish you, Mr. Zito, in my view there's no

1 justification for a prison term.

2 Is there justification for an extended period --
3 somewhat extended period of probation? Is there
4 justification for a period of home detention? Yes. And I
5 think that is a sentence that is a sufficient but not greater
6 than necessary sentence.

7 Looking at you as an individual, not discounting the
8 seriousness of the offense, but looking at you as an
9 individual, really, what are the chances or what is the
10 probability that you will commit another crime?

11 What do you think that is?

12 THE DEFENDANT: Zero, Your Honor.

13 THE COURT: Frankly, I think that's -- it's zero
14 also. And you'll be monitored while you're on probation.
15 And so it serves a community's purpose to a greater extent
16 that you are allowed to remain in the community under
17 supervision with some conditions of home detention, but so
18 that you can continue to contribute to your family and parent
19 your family and be -- and do the good things that you've done
20 in your life.

21 And I would hate to think that someone who has led a
22 good and decent life and has made some bad choices and
23 committed a crime that the good things that you've done don't
24 come into consideration and, in fact, they absolutely do, and
25 that's why we have the 3553(a) factors.

1 And for those reasons, it is the judgment of the
2 Court that you be sentenced to a term of probation for a
3 period of three years. And on that -- while you're on
4 probation, I am going to then require that a period of home
5 detention, and that is a period of six months, where you are
6 restricted to your residence at all times except for
7 employment, education, religious services, medical, substance
8 abuse or other mental health treatment, attorney visits,
9 court appearances, Court-ordered obligations, or other
10 activities as pre-approved in writing by your probation
11 officer.

12 I would note that this is one of the very few
13 instances where the guidelines actually allow for
14 probation -- just an aside.

15 While you're on probation you shall not commit any
16 federal, state, or local crimes and shall not possess a
17 controlled substance. You shall cooperate in the collection
18 of DNA as directed by your probation officer. I would note
19 that this apparently is not an offense, a conviction for
20 which, impacts Mr. Zito's ability to possess firearms.

21 And so I'll address that in the special conditions,
22 and I know while he's been on pretrial release there was a
23 special condition imposed by Judge Cavan related to firearms.

24 So you shall comply with the standard conditions of
25 supervision as recommended by the United States Sentencing

1 Commission and which have been approved by this Court with
2 the exception of Special Condition No. 10 that prohibits
3 possession of firearms, etcetera, because that is not a
4 condition that would apply to this conviction, so Standard
5 Condition No. 10 will be deleted from the judgment.

6 You must comply with the following special
7 conditions of supervision: All employment must be approved
8 in advance in writing by your probation officer. You must
9 consent to third-party disclosure to any employer or
10 potential employer.

11 While on supervision, you must fulfill all tax
12 obligations and adherence to Internal Revenue Service
13 requirements. You must apply all monies received from income
14 tax refunds, lottery winnings, judgments, or any other
15 financial gains to any outstanding Court-ordered financial
16 obligations.

17 I am ordering that you pay a fine in the amount of
18 \$27,000. There is a provision for paying that fine over a
19 period of time, and that rate would be as directed by your
20 probation officer, but it is my understanding that you intend
21 to pay that fine in full today.

22 Is that correct, Mr. Zito?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Okay. And that fine shall be paid to
25 the clerk of this court.

1 You must submit your person, residence, place of
2 employment, vehicles, and papers to a search, with or without
3 a warrant, by any probation officer based on reasonable
4 suspicion of contraband or evidence in violation of a
5 condition of release.

6 Failure to submit to search may be grounds for
7 revocation. You must warn any other occupants that the
8 premises may be subject to searches pursuant to this
9 condition. You must allow seizure of suspected contraband
10 for further examination.

11 The condition with regard to home detention will
12 also -- will be included as a special condition, and I've
13 read to you the parameters of that condition which, as I
14 said, will be in place for a period of six months.

15 And then with regarding firearms, and this is the
16 special condition language requested by the person who is
17 going to supervise you, Mr. Zito, that special condition
18 shall read as follows: You must not possess firearms or
19 ammunition without the prior approval from your U. S.
20 Probation Officer.

21 In addition to the fine, you are ordered to pay to
22 the United States a special assessment of \$100 which shall be
23 due immediately.

24 And you understand, Mr. Zito, that pursuant to the
25 plea agreement, that you have waived your right to appeal

1 this sentence.

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Any legal objection to the sentence?

4 MR. DAKE: No objection, Your Honor. Just a
5 clarifying point, in that usual condition of home confinement
6 there is the location monitoring. It is the Court's
7 intention to include that? I just want to make sure that
8 that's clear for Mr. Zito on the record.

9 THE COURT: I do not intend to include that.

10 MR. DAKE: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. DAKE: No objection. Thank you, Your Honor.

13 THE COURT: Okay. Thank you.

14 Any legal objection, Mr. Lacny?

15 MR. LACNY: No, Your Honor. Thank you.

16 THE COURT: Okay. And do you want Mr. Zito to go
17 with you, Officer Arledge --

18 OFFICER ARLEDGE: Yes.

19 THE COURT: -- or do you have another plan?

20 OFFICER ARLEDGE: I have reporting instructions for
21 him.

22 THE COURT: Once we adjourn, Mr. Zito, you must
23 accompany Officer Arledge, who I'm told will be actually
24 supervising you, because she is moving from writing to
25 supervising, but she will give you instructions with regard

1 to the three-year stint of probation.

2 And we're adjourned.

3 MR. LACNY: Thank you, Your Honor.

4 THE CLERK: All rise.

5 (Whereupon, the proceedings concluded at 4:22 p.m.)

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CERTIFICATE OF REPORTER

1
2 I, Kim Marchwick, a Registered Professional
3 Reporter and Certified Realtime Reporter, do hereby certify
4 that the foregoing 37 pages of transcript is a true and
5 correct record of the proceedings given at the time and
6 place hereinbefore mentioned; that the proceedings were
7 reported by me in machine shorthand and thereafter reduced
8 to typewritten form using Computer-Aided Transcription; that
9 after being reduced to typewritten form, a certified copy of
10 this transcript will be filed electronically with the court.

11 I further certify that I am not an attorney for nor
12 employed by, nor related to any of the parties or attorneys
13 to this action, nor financially interested in this action.

14 Whereupon, this document was signed by me in
15 Billings, Montana, this Tuesday, the 18th day of April,
16 2023.

17
18
19 */s/ Kim Marchwick*

20 _____
21 Kim Marchwick
22 Registered Professional Reporter
23 Federal Certified Realtime Reporter
24 Certified Realtime Reporter
25 2601 2nd Avenue North
Billings, Montana 58102
(406) 671-2307
marchwickkim@gmail.com

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA BILLINGS DIVISION

UNITED STATES OF AMERICA

v.

NATHAN NEPHI ZITO

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 22-113-BLG-SPW-1

USM Number: **26708-510**

Peter F. Lacny

Defendant's Attorney

THE DEFENDANT:

<input checked="" type="checkbox"/>	pleaded guilty to count(s)	1
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

15:2.F Attempted Monopolization

Offense Ended

10/01/2020

Count

1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 29, 2023

Date of Imposition of Judgment


Signature of Judge

Susan P. Watters

United States District Judge

Name and Title of Judge

March 29, 2023

Date

DEFENDANT: NATHAN NEPHI ZITO
CASE NUMBER: CR 22-113-BLG-SPW-1

PROBATION

The defendant is hereby sentenced to probation for a term of: three (3) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*
7. You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(check if applicable)*
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: NATHAN NEPHI ZITO
CASE NUMBER: CR 22-113-BLG-SPW-1

STANDARD CONDITIONS OF PROBATION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at <https://www.mtp.uscourts.gov/post-conviction-supervision>.

Defendant's Signature _____

Date _____

DEFENDANT: NATHAN NEPHI ZITO
CASE NUMBER: CR 22-113-BLG-SPW-1

SPECIAL CONDITIONS OF PROBATION

1. All employment must be approved in advance in writing by the probation officer. You must consent to third-party disclosure to any employer or potential employer.
2. While on supervision, you must fulfill all tax obligations in adherence to Internal Revenue Service requirements.
3. You must apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other financial gains to outstanding court-ordered financial obligations.
4. You must pay a fine in the amount of \$27,000. You are to make payments at a rate directed by United States Probation. Payment shall be made to the Clerk, United States District Court, James F. Battin U.S. Courthouse, 2601 2nd Avenue North, Billings, Montana 59101.
5. You must submit your person, residence, place of employment, vehicles, and papers, to a search, with or without a warrant by any probation officer based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. You must allow seizure of suspected contraband for further examination.
6. You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved in writing by the probation officer for a period of six (6) months.
7. You must not possess firearms or ammunition without the prior approval from the U.S. Probation Officer.

DEFENDANT: NATHAN NEPHI ZITO
CASE NUMBER: CR 22-113-BLG-SPW-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	<u>Assessment</u>	<u>JVTA</u> <u>Assessment**</u>	<u>AVAA</u> <u>Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$ 0.00	\$ 0.00	\$27,000.00	\$.00

- The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- Restitution amount ordered pursuant to plea agreement \$
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|--|-------------------------------|--|
| <input checked="" type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input checked="" type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: NATHAN NEPHI ZITO
CASE NUMBER: CR 22-113-BLG-SPW-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** Lump sum payments of \$ 100 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or
- B** Payment to begin immediately (may be combined with C, D, or F below); or
- C** Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** Special instructions regarding the payment of criminal monetary penalties:
Criminal monetary penalty payments are due during imprisonment at the rate of not less than \$25.00 per quarter, and payment shall be through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk, United States District Court, James F. Battin Federal Courthouse, 2601 2nd Ave North, Ste 1200, Billings, MT 59101 or online at <https://www.pay.gov/public/form/start/790999918>. Please see www.mtd.uscourts.gov/criminal-debt for more information.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Peter F. Lacny
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Attorney for Defendant NATHAN NEPHI ZITO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATHAN NEPHI ZITO,</p> <p style="text-align: right;">Defendant.</p>	<p>Cause No.: CR 22-113-BLG-SPW</p> <p style="text-align: center;">MOTION TO AMEND PROBATION CONDITIONS</p>
--	--

NATHAN NEPHI ZITO, by and through counsel, hereby moves the Court to amend his conditions of release to (1) replace his home arrest condition with a curfew condition; and (2) allow Mr. Zito to travel for family purposes in August of 2023.

Mr. Zito makes this Motion pursuant to 18 U.S.C. § 3563(c) and Federal Rule of Criminal Procedure 32.

The government objects to amending his home arrest condition.

The government has no objection to his proposed August travel.

The reasons for the requested amendment are set forth in the accompanying brief.

DATED this 11th day of July, 2023.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Peter F. Lacny
Peter F. Lacny
Attorney for Nathan Nephi Zito

CERTIFICATE OF SERVICE

L.R. 5.2(b)

I, Peter F. Lacny, attorney for Defendant, hereby certifies that a copy of the Defendant's Motion was served on these persons by the following means:

- 1, 2 CM/ECF
- Hand Delivery
- Mail
- Overnight Delivery Service
- Fax
- 3,4 Email

1. Clerk, U.S. District Court
2. Bryan Dake and Jeremy Goldstein, U.S. Attorney Office
3. U.S. Probation Office
4. Nathan Nephi Zito

DATED this 11th day of July, 2023.

By: /s/ Peter F. Lacny
Peter Lacny

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Email: placny@dmlaw.com

Attorney for Defendant NATHAN NEPHI ZITO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATHAN NEPHI ZITO,</p> <p style="text-align: right;">Defendant.</p>	<p>Cause No.: CR 22-113-BLG-SPW</p> <p style="text-align: center;">BRIEF IN SUPPORT OF MOTION TO AMEND PROBATION CONDITIONS</p>
--	--

NATHAN NEPHI ZITO, by and through counsel, submits this brief in support of his Motion to Amend Probation Conditions.

Mr. Zito makes this Motion pursuant to 18 U.S.C. § 3563(c) and Federal Rule of Criminal Procedure 32.

Background

On March 29, 2023, Mr. Zito was sentenced to three years of probation subject to a number of conditions—including a six-month home confinement condition. (Doc. 21). Since his sentencing date, Mr. Zito has paid all his court ordered financial obligations, has followed the home arrest rules, and has been totally compliant with all other probationary conditions.

Recently, Mr. Zito's father has been placed into hospice and given months to live. Mr. Zito desires to spend more time with his father in his final months, but that is difficult to do with the home arrest condition in place.

Mr. Zito understands the need for continued accountability for his offense, and proposes that instead of striking the condition entirely, that the Court convert his home arrest condition to a curfew condition requiring him to be at his residence from 10:00 pm until 5:00 AM daily.

Also, Mr. Zito seeks permission to briefly leave the district of Montana from August 7-16 for family travel. Specifically, he would like to attend a family wedding in North Platte, Nebraska, and then assist his wife at dropping their son off at college in St. George, Utah.

The government objects to amending his home release condition.

The government has no objection to his proposed out of District travel in August.

Discussion

A district court may modify probation conditions upon defendant's motion. *18 U.S.C. 3563 (c); Fed. Rule Crim. P. 32.1(c)*. In modifying conditions, a court considers the factors that guided the initial setting of the conditions. *18 U.S.C. § 3563(c); see id. § 3563(b)* (referring to the factors set forth in *18 U.S.C. §§ 3553(a)(1)-(2)*). "When weighing these factors, the Court 'enjoys discretion to consider a wide range of circumstances.'" *United States v. Fischer*, No. CR17-69RSL, 2018 U.S. Dist. LEXIS 141927, at *2 (W.D. Wash. Aug. 21, 2018).

A. Home Arrest Condition Modification.

Mr. Zito was placed on home arrest on March 29, 2023 for six months. Mr. Zito has completed over half of his term of home arrest, and has been completely compliant with that condition and all others.

Mr. Zito seeks a modification of the home arrest condition so that he can more easily spend time with his father, who suffers from heart

failure, and has been recently placed in hospice care. Doctors expect that Mr. Zito's father only has a few months to live.

While probation has been gracious and allows Mr. Zito to schedule time out of his home to visit with his father, Mr. Zito would obviously like to spend as much time with his father as possible in the coming months. This is difficult to do with the home arrest condition currently in place because Mr. Zito is not certain at the beginning of each week (when he makes his home arrest schedule) which hours during the coming week his father will be most lucid and awake.

Mr. Zito respectfully asks that in light of that circumstance, his exemplary compliance with probation thus far, and his completion of slightly more than half of the original home arrest term, that the Court strike the home arrest condition and replace the condition with a curfew requiring Mr. Zito to be at his residence from 10:00 pm to 5:00 am.

B. Temporary Travel Restriction Modification.

Mr. Zito seeks a temporary modification of his conditions to allow him to travel out of the District from August 7-16 for a family wedding and to accompany his son to his college orientation. Mr. Zito requests an Order from the Court allowing travel on those dates, and allowing him

to not be subject to home arrest on those dates (if the condition is not modified as requested above).

The government has no objection to this travel request.

DATED this 11th day of July, 2023.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Peter F. Lacny
Peter F. Lacny
Attorney for Nathan Nephi Zito

CERTIFICATE OF SERVICE

L.R. 5.2(b)

I, Peter F. Lacny, attorney for Defendant, hereby certifies that a copy of the Defendant's foregoing Brief in Support of Motion to Amend Conditions of Release was served on these persons by the following means:

- 1, 2 CM/ECF
- Hand Delivery
- Mail
- Overnight Delivery Service
- Fax
- 3,4 Email

1. Clerk, U.S. District Court
2. Bryan Dake and Jeremy Goldstein, U.S. Attorney Office
3. U.S. Probation Office
4. Nathan Nephi Zito

DATED this 11th day of July, 2023.

By: /s/ Peter F. Lacny
Peter Lacny

BRYAN T. DAKE
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Email: bryan.dake@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. NATHAN NEPHI ZITO, Defendant.	CR 22-113-BLG-SPW GOVERNMENT'S RESPONSE TO DEFENSE MOTION TO AMEND PROBATION CONDITIONS
---	--

INTRODUCTION

Nathan Zito moves to amend his probation conditions to prematurely end his six-month home confinement period and temporarily modify his travel restrictions to permit brief out-of-state travel. (Doc. 26.) For reasons explained below, the United States respectfully requests the Court deny the defendant's request to terminate his period of home confinement and grant the motion to modify travel restrictions from August 7-16, 2023.

BACKGROUND

The defendant, Nathan Zito, created a paving and asphalt contracting company which provided crack sealing services on publicly funded highway projects. Zito bid on highway construction and repair projects for over twenty years and was aware those projects are awarded through competitive bidding processes. However, rather than compete on merits and hard work, Zito attempted to bypass the bidding process by pressing a competitor to divide two local markets, erasing the essential need for these companies to compete against each other in the future, and monopolize the market. In doing so, Zito attempted to disguise his conduct by creating an artificial transaction to provide perceived legal cover.

This was not Zito's first attempt to enter into similar deals as he has tried this with other companies in the past. If Zito had been successful in creating this

monopoly, there would have been a dangerous probability that he would have eliminated essential competition and been free to raise prices or limit output.

On October 14, 2022, Zito pled guilty to one count of attempted monopolization. (Doc. 5.) In his sentencing memorandum, Zito asked the Court for a sentence of probation. (Doc. 15.) In requesting probation, he noted he “will face significant personal impacts from a probationary sentence, including strict supervision and constraints on his freedom.” (Doc. 15 at 12.) He also acknowledged that his “ability to freely travel and live life as a regular citizen will be curtailed.” (*Id.*)

The United States requested a guideline imprisonment sentence, highlighting the seriousness of Zito’s offense and the multiple cases from other districts that sentenced defendants who committed similar offenses to periods of incarceration. (Doc. 17.)

On March 29, 2023, Zito was sentenced to three years of probation, with the first six months having an imposed condition of home detention as a substitute for imprisonment. (Doc. 21.) In sentencing Zito to a term of home confinement, the Court stated “Is there justification for an extended period -- somewhat extended period of probation? Is there justification for a period of home detention? Yes. And I think that is a sentence that is a sufficient but not greater than necessary

sentence.” *Transcript of March 29, 2023 Sentencing Hearing* at p. 32. Zito’s term of home detention will end on September 29, 2023. Zito has already completed more than half of his six months of home detention and has less than eighty days remaining.

ARGUMENT

A. Modifying Home Detention Condition

A district court may modify probation conditions upon a defendant’s motion. *See* 18 U.S.C. § 3563(c); *see also* Fed. R. Crim. P. 32.1(c). As Zito notes, the Court is considering a “discretionary condition” imposed by the Court under 18 U.S.C. § 3563(b), therefore the Court may consider the appropriate facts under 18 U.S.C. § 3553(a)(1) and (2).

As an initial matter, the government certainly understands Zito’s position and the government extends its sympathies to Zito and his family in this trying time, but this Court should not modify his conditions solely for this reason. Particularly when Zito is able to work with USPO to properly arrange visitations with his father. *See United States v. Rahman*, 2022 WL 17061293 at *3 (D. Nevada 2022) (denying Rahman’s motion to modify conditions to allow him to travel to see his ailing mother). Zito acknowledges that probation “has been gracious and allows Mr. Zito to schedule time of his home to visit with his father”

and the government has no reason to believe that the generosity shown by USPO would not continue for Mr. Zito.

However, there are consequences to a person's conduct and Zito acknowledged as much in his letter to the Court: "I will accept and comply with whatever sentence you deem appropriate." PSR ¶ 17. Yet, Zito now requests further latitude from the Court, who could have sentenced Zito to a term of imprisonment. *See United States v. Thorpe*, 2023 WL 235876 at *2 (D. Idaho 2023) ("[g]ranted Thorpe early release from his probation gives him a better deal than the already generous sentence he received. This fact that Thorpe avoided the imprisonment contemplated by the Sentencing Guidelines is yet another reason in support of making him serve the full period of probation"). Like *Thorpe*, Zito avoided a sentence of imprisonment. Zito specifically requested a sentence of probation, rather than serving his sentence in prison in his sentencing memorandum, stating "Nathan asks that this Court sentence him to probation with appropriate conditions." (Doc. 15 at 17.) The Court did exactly as Zito requested and now he is asking for further leniency. Zito committed a serious offense and should accept the conditions of probation.

The burden of home confinement, which has only placed a burden on Zito to receive permission to leave his home and visit his father, now lasts for only

approximately eight weeks. *See Thorpe*, 2023 WL 235876 at *3 (“[p]robation does not place a significant burden on [Thorpe] other than requiring him to obtain permission to travel”). It seems logical that given the driving time from Billings to Corvallis that Zito will need to plan accordingly for the trips to visit his father and such planning will simply need to involve USPO for the next two months.

Finally, Zito bases his request on him “be[ing] completely compliant with that condition and all others.” Doc. 27 at 3. However, abiding by the conditions of a sentence he asked for is not enough for the Court to grant his motion to modify his probation conditions. *See United States v. Turner*, 2017 WL 3431587 at *1 (D. Hawai’i 2017) (denying Turner’s request to modify conditions of probation based on compliance with terms of probation, stating “[r]arely are conditions modified within the first year (sometimes the first half) of a term, and even then there must be some showing other than mere compliance”).

Again, the government expresses sympathy for Zito. The impending loss of a parent is difficult. Numerous federally imprisoned defendants are missing births, deaths, weddings, and other significant milestones in their lives and the lives of the people they are closest to. Each of these individuals are facing real consequences of their conduct. Zito is no different and has already received a benefit not enjoyed by others – he gets to be with his father, he just has to get permission. As such, the

Court should deny Zito's motion to terminate his period of home confinement.

B. Temporarily Modifying Travel Restriction

Zito also requests a temporary modification from his travel restrictions so he may be able to attend a family wedding and take his son to college out of state from August 7-16, 2023. (Doc. 27 at 4.)

The United States has no objection to that request and believes the Court should grant this motion.

CONCLUSION

Based on the aforementioned reasons, the United States respectfully requests the Court deny Zito's motion to amend probation conditions and grant Zito's motion to temporarily modify his travel restrictions.

DATED this 21st day of July, 2023.

JESSE A. LASLOVICH
United States Attorney

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: right;">Plaintiff,</p> <p>v.</p> <p>NATHAN NEPHI ZITO,</p> <p style="text-align: right;">Defendant.</p>	<p>Cause No.: CR 22-113-BLG-SPW</p> <p style="text-align: center;">REPLY BRIEF RE: MOTION TO AMEND PROBATION CONDITIONS</p>
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NATHAN NEPHI ZITO, by and through counsel, replies to the government's response to his Motion to Amend his probation conditions.

Mr. Zito stands on the arguments made in his opening brief. Mr. Zito replies to reiterate that while he is asking that his home arrest condition be stricken, he proposes that a curfew condition from 10:00

pm to 5:00 am be ordered in place of the home arrest condition. This proposed “step down” in supervision from home arrest to a curfew for the remaining weeks would continue to hold Mr. Zito accountable and continue to serve as punishment for his offense conduct.

Finally, Mr. Zito clarifies that his father lives in the Billings area, not in Corvallis.

DATED this 24th day of July, 2023.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Peter F. Lacny
Peter F. Lacny
Attorney for Nathan Nephi Zito

CERTIFICATE OF SERVICE

L.R. 5.2(b)

I, Peter F. Lacny, attorney for Defendant, hereby certifies that a copy of the Defendant's foregoing Reply Brief was served on these persons by the following means:

- 1, 2 CM/ECF
- Hand Delivery
- Mail
- Overnight Delivery Service
- Fax
- 3,4 Email

1. Clerk, U.S. District Court
2. Bryan Dake and Jeremy Goldstein, U.S. Attorney Office
3. U.S. Probation Office
4. Nathan Nephi Zito

DATED this 24th day of July, 2023.

By: /s/ Peter F. Lacny
Peter Lacny

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATHAN NEPHI ZITO,

Defendant.

CR 22-113-BLG-SPW

ORDER

Before the Court is Defendant Nathan Zito's Motion to Amend Probation Conditions. (Doc. 26). Zito moves under 18 U.S.C. § 3563(c) and Federal Rule of Criminal Procedure 32.1(c) to amend his conditions of release to (1) replace his home confinement condition with a curfew, and (2) to allow Zito to travel out of state from August 7, 2023, through August 16, 2023. (Doc. 26 at 1-2). The United States opposes the home confinement condition modification but does not oppose the out of state travel condition. (Doc. 28 at 2). For the following reasons, the Court denies the motion as to the home confinement condition and grants the motion as to out of state travel.

The Court may modify probation conditions upon a defendant's motion under 18 U.S.C. § 3563(c) and Federal Rule of Criminal Procedure 32.1(c). When considering whether to modify a "discretionary condition" imposed under 18

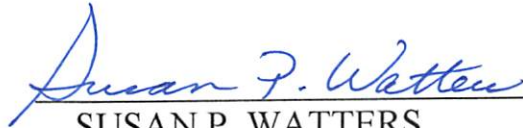
U.S.C. § 3563(b), the Court may consider the 18 U.S.C. § 3553(a)(1) and (2) factors, just as at sentencing. Zito seeks to amend his home confinement condition so that he may more easily visit his father, who has been placed into hospice care. (Doc. 27 at 4). Additionally, Zito seeks to amend his out of state travel condition to allow him to attend a family wedding in Nebraska and drop off his son at college in Utah.

Considering the nature and circumstance of the offense, the history and characteristics of Zito, and the need of the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment and to afford adequate deterrence to criminal conduct, the Court finds that modification of the home confinement condition is not appropriate at this time. The Court extends its condolences to Zito during this difficult period. However, as the United States points out, a great many imprisoned defendants miss significant periods of their lives and those of their loved ones as a consequence of their criminal conduct. Home confinement was imposed in lieu of a term of imprisonment to address the seriousness of the offense and to deter future similar conduct. A modification substantially altering this condition at this juncture would serve to greatly undercut the reasons the Court imposed the sentence. As such, the Court denies the motion as to this condition.

However, given the circumstances, the Court grants permission for the out of state travel request, given that the motion is unopposed by the United States and Zito's supervising officer. Zito may travel out of the district from August 7, 2023, through August 16, 2023.

IT IS HEREBY ORDERED that Zito's Motion to Amend Probation Conditions is GRANTED IN PART and DENIED IN PART.

DATED this 31st day of July, 2023.



SUSAN P. WATTERS
United States District Judge