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**ATTORNEY FOR PLAINTIFF**  
**UNITED STATES OF AMERICA**

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

<b>UNITED STATES OF AMERICA,</b>  <b>Plaintiff,</b>  <b>vs.</b>  <b>NATHAN NEPHI ZITO,</b>  <b>Defendant.</b>	<b>CR 22-113-BLG-SPW</b>  <b>GOVERNMENT'S RESPONSE TO</b> <b>DEFENSE MOTION TO AMEND</b> <b>PROBATION CONDITIONS</b>
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## **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]ranting 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.

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*/s/ Bryan T. Dake*  
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