

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

iROBOT CORPORATION,

Plaintiff,

v.

ROBOTIC FX, INC.,

Defendant.

C. A. No. 2:07-cv-1511-UWC-RRA

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**PLAINTIFF iROBOT CORPORATION'S OPENING BRIEF IN SUPPORT OF  
MOTION FOR SANCTIONS FOR VIOLATION OF TRO**

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Pursuant to the Court's inherent powers and Federal Rule of Civil Procedure 37(b), Plaintiff iRobot Corporation moves for a finding of contempt against Robotic FX and an award of monetary sanctions for Mr. Ahed's violation of this Court's Amended Temporary Restraining Order ("TRO") and his related actions.

Over the course of four days immediately after the filing of this suit, Mr. Jameel Ahed (president and sole shareholder of Robotic FX) – often accompanied by Ms. Kimberly Hill (Mr. Ahed's girlfriend and Robotic FX's Chief Operating Officer) – deliberately discarded and/or destroyed multiple objects of physical evidence that came from iRobot. The Court may recall that iRobot's August 20, 2007 motion for temporary restraining order detailed that Mr. Ahed discarded some 37 separate items of evidence into a dumpster near Ms. Hill's apartment on the morning of August 18. This deliberate destruction led the Court to issue a TRO which provides, *inter alia*, that Robtic FX and its officers and employees are:

TEMPORARILY RESTRAINED from failing to preserve all evidence, information, data and documents concerning 1) the patent at issue in this case, 2) the technology described in the patents at issue, 3) the use of the technology described in the patents at issue, and 4) the allegations made the basis of the Plaintiff's complaint.

Docket Item No. 6.

Unbeknownst to iRobot at the time the TRO was sought, Mr. Ahed's destruction of evidence in this case extended far beyond the items of physical evidence he discarded. Mr. Ahed also systematically collected and destroyed approximately 100 CDROM disks containing development details of the robots at issue, he erased three computer hard drives which allegedly served to back-up data on the Robotic FX company server, he "wiped clean" the deleted files from his personal laptop and office computer, and critically, Ahed irrevocably destroyed all data contained on a laptop he owned during his employment at iRobot, which was then used in Robotic FX's development of the competing Negotiator robot.

On Tuesday, August 21, 2007, United States Marshals, assisted by forensic specialists and iRobot counsel, served Robotic FX with the TRO. During the searches ordered by the TRO, and with full knowledge of the terms of the TRO, Mr. Ahed deliberately and intentionally concealed his destruction of evidence in order to prevent discovery of his spoliation. Specifically, Mr. Ahed reached Ms. Hill's apartment before the U.S. Marshals, forensic experts, and counsel for both parties. Mr. Ahed used his time alone in Ms. Hill's apartment to conceal the laptop he claims to have previously purged by putting it in a protective case and hiding it under the bed with the express intention of concealing it from the U.S. Marshals. Mr. Ahed, after being served with this Court's TRO, therefore, attempted to continue his course of action by

hiding his destruction of evidence—an action which would have itself effectively destroyed the evidence of his spoliation conduct. The TRO was entered to maintain and preserve evidence. Mr. Ahed’s efforts to conceal his destruction of evidence violated both the spirit and terms of the TRO.

The undisputed facts now<sup>1</sup> of record, thus, establish that Mr. Ahed’s destruction of evidence continued even after Mr. Ahed read the terms of this Court’s TRO. Indeed, in a parallel trade secrets action, the U.S. District Court for the District of Massachusetts recently held in a November 2, 2007, decision granting in-part iRobot’s request for a preliminary injunction:

Ahed has admitted that he discarded certain physical items, destroyed electronic data, and attempted to hide other information, all of which presumptively had relevance to this case. These actions took place not just after Ahed was sued, but after he was ordered by a court to preserve evidence.

Ex. 12 (PI Op. (public), C.A. No. 07-11611-NG), at 3 (emphasis in original).<sup>2</sup> The violation of the Court’s TRO warrants: (i) a finding of contempt; and (ii) an award of monetary sanctions of an amount not less than the fees and costs incurred by iRobot’s efforts to secure the TRO and conduct the follow-up work regarding Robotic FX’s spoliation of evidence.

Mr. Ahed’s destruction of evidence also resulted in substantial and irreversible prejudice to iRobot’s ability to discover relevant evidence that had been in Mr. Ahed’s possession and control. Although this Court is not currently handling the underlying patent infringement claim,

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<sup>1</sup> Robot recently completed depositions of two additional Robotic FX employees, thus concluding the last portion of the expedited discovery allowed by this Court to address Mr. Ahed’s actions. While the most recent depositions do not reveal any additional efforts to dispose of evidence, the witnesses’ testimony is troubling in that they have apparently never been advised that they should preserve relevant evidence. *See* Ex. 5, Bethke Rough Deposition Transcript, at 19:10-17 and 40:26– 41:23; Ex. 6, Weber Rough Deposition Transcript, at 61:22-25 and 64:22–66:5.

<sup>2</sup> Unless otherwise noted, all Exhibits are attached to the Public Declaration of Thomas L. Halkowski, filed contemporaneously herewith.

Your Honor is most familiar with the conduct that led to the granting of the TRO and the discovery allowed by this Court pursuant to the TRO. Therefore, iRobot respectfully defers as to how to proceed regarding further sanctions to address Robotic FX's spoliation of evidence and requests this Court to make whatever findings of fact and rulings or other suggestions that are appropriate regarding the imposition of any such sanctions.

## **I. STATEMENT OF FACTS**

iRobot designs, manufactures, and sells robots for various purposes. One of iRobot's most successful products is a tactical robot, called the PackBot. The PackBot has been used extensively by the U.S. military in Afghanistan and Iraq to perform tasks that are too hazardous for soldiers, such as bomb disposal. *See* Ex. 2, September 24, 2007 Unsealed Transcript of Preliminary Injunction Hearing in the District of Massachusetts ("9/24/07 Unsealed Hearing Tr."), at 275:2-16.<sup>3</sup> The PackBot is the culmination of years of research and development and substantial financial investment. *Id.* at 292:17-293:16. iRobot has obtained patents covering certain features that were incorporated in the PackBot, including U.S. Patent Nos. 6,263,989 (the "989 Patent") and 6,431,296 (the "296 Patent"), which are asserted in this lawsuit.

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<sup>3</sup> A preliminary injunction hearing regarding iRobot's allegations of Mr. Ahed's trade secret misappropriation and breach of contract in C.A. No. 07-11611-NG was conducted over a period of four days by the U.S. District Court for the District of Massachusetts. A full set of transcripts from these proceedings have been provided for this Court's consideration. *See* Ex. 1, 9/20/07 Preliminary Injunction Hearing Transcript (Public Halkowski Declaration); Ex. 1S, 9/20/07 Preliminary Injunction Transcript (Sealed Halkowski Declaration); Ex. 2, 9/24/07 Preliminary Injunction Hearing Transcript (Public Halkowski Declaration); Ex. 2S, 9/24/07 Preliminary Injunction Hearing Transcript (Sealed Halkowski Declaration); Ex. 3, 10/1/07 Preliminary Injunction Hearing Transcript (Public Halkowski Declaration); Ex. 3S, 10/01/07 Preliminary Injunction Hearing Transcript (Sealed Halkowski Declaration); and Ex. 4, 10/30/07 Preliminary Injunction Hearing Transcript (Public Halkowski Declaration). As noted above, the Massachusetts Court's decision granting in-part iRobot's request for a preliminary injunction is submitted as Ex. 12 (public version) to the Public Halkowski Declaration, and Ex. 13 (sealed version) to the Sealed Halkowski Declaration.

Jameel Ahed was an employee at iRobot from July 2000 until June 2002. *Id.* at 281:25-282:4, 283:1-6, 296:18-20, 297:21-23. Prior to leaving iRobot, and unbeknownst to iRobot officials, Mr. Ahed began forming his own company, Robotic FX. *Id.* at 175:5-17, 178:15-18.<sup>4</sup> Before leaving iRobot, Mr. Ahed obtained from a co-worker a copy of one of the patents asserted in this case, U.S. Patent No. 6,263,989 patent, which covers core technology regarding the robot's mobility features. *See* Ex. 7, E-mail dated May 29, 2002, from "spratt@irobot.com" to "ahed@irobot.com." At this time, Mr. Ahed also had access to iRobot emails containing detailed technical information regarding iRobot's PackBot as well as iRobot's central computer server as part of the regular course of his employment as a PackBot project engineer. Ex. 12 (PI Op. (public)), at 5; *see also* Ex. 2, (9/24/07 Unsealed Hearing Tr.), at 281:16-282:4.

After Mr. Ahed's departure from iRobot, Robotic FX later began marketing a tactical robot — the Negotiator — which is strikingly similar in design and function to the PackBot. *See* Ex. 2, (9/24/07 Unsealed Hearing Tr.) at 302:24-303:6, 304:7-305:3.

On Friday, August 17, 2007, iRobot filed its complaint in this lawsuit alleging infringement of the '989 Patent and '296 Patents by Defendant Robotic FX. On that same day, counsel for iRobot emailed a courtesy copy of the complaint (as well as a concurrently-filed

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<sup>4</sup> Other facts of concern regarding Mr. Ahed's actions prior to leaving iRobot are discussed in the Massachusetts Court's PI decision (*see* Ex. 12, at 4-8) and were the subject of testimony during the preliminary injunction hearing in Massachusetts. *See, e.g.*, Ex. 2, (9/24/07 Unsealed Hearing Tr.) at 167:17-175:4, 183:11-184:5; 556:3-558:1 (addressing Mr. Ahed's efforts to obtain extensive design files just days prior to submitting his resignation, and a June 22, 2002, email evidencing Mr. Ahed's accessing the iRobot computer system the day after leaving iRobot and forwarding technical information to his Robotic FX email account).

Massachusetts Trade Secrets Action)<sup>5</sup> to Robotic FX’s attorneys along with a letter reminding them of the obligation to preserve all evidence. *See* Ex. 8, Affidavit of Thomas Halkowski (“Halkowski Aff.”), Ex. F. (“In addition to providing you courtesy copies of these documents, I write to remind you of Defendants’ obligations under federal law as well as Alabama and Massachusetts state law to preserve all evidence related to the above-described litigations, including all electronic material on every computer used by Mr. Ahed or Robotic FX....”). Mr. Ahed admitted that: (i) he learned of this lawsuit on Friday, August 17, 2007 (*see* Ex. 9, Second Deposition Transcript of Jameel Ahed (“Second Ahed Depo. Tr.”), at 13:7-10); (ii) he received copies of the complaints on that date; and (iii) he was aware that it was “not okay to destroy evidence.” *Id.* at 13:3-6. Mr. Ahed claims not to have read the complaints upon receipt of them, but as the Massachusetts Court determined, this is “a claim that strains credulity.” Ex. 12 (PI Op. (public)), at 10.

Notwithstanding his claim to have not read the complaints, late in the evening of August 17, Mr. Ahed systematically searched Robotic FX’s offices for evidence to be destroyed, including: (i) physical evidence he derived from iRobot including a specially-made molding fixture used internally at iRobot as part of its confidential process for manufacturing a critical component of the PackBot (*see* Ex. 12 (PI Op. (public), at 11); (ii) approximately 100 CDROM disks which were collected from various locations within Robotic FX’s offices;<sup>6</sup> (iii) three

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<sup>5</sup> The merits of the Massachusetts case focuses upon the misappropriation of *confidential* trade secrets in or around 2002; conversely, this suit concerns Robotic FX’s use of technology made *publicly available* via the issuance of two iRobot patents. Similarly, the other claims asserted in Massachusetts, including the claim based upon Mr. Ahed’s breach of his employment agreement, have little, if anything, to do with the merits of this suit.

<sup>6</sup> Mr. Ahed purchased a CDROM “burner,” a device capable of “burning” large amounts of data on to a CDROM disk, a few weeks prior to departing iRobot. *See* Ex. 10, E-mail dated June 10, 2002, from ahed@irobot.com to gwsmith111@yahoo.com.

external computer hard drives which allegedly served to back-up data on the Robotic FX company server; and (iv) a laptop owned by Mr. Ahed during his employment at iRobot and used in Robotic FX's development of the competing Negotiator robot. *See* Ex.2, (9/24/07 Unsealed Hearing Tr.), at 233:4-25; 243:6-13; 244:15-20.<sup>7</sup> By midnight, these items had all been collected by Mr. Ahed into one large duffle bag (approximately four or five feet long, two feet wide, and a foot deep) which he placed into Ms. Hill's car trunk. *See* Ex. 9, (Second Ahed Depo. Tr.) at 17:5-34:13; Docket Item No. 9, Aff. of Emil Cargola, at ¶5. Shortly after leaving Robotic FX's offices, Mr. Ahed states he has a loss of memory and cannot recall anything until later the next day—including whether or not he destroyed any other evidence. *See* Ex. 9, (Second Ahed Depo. Tr. 9/19) at 36:16-37:4; *see* also Ex. 12 (PI Op. (public)) at 11.

On August 18, 2007, one day after iRobot filed its complaint, Mr. Ahed was photographed attempting to destroy some of the evidence he had collected the night before. *See* Docket Item No. 9, Aff. of Tomás Romano at ¶6. Mr. Ahed disposed of all the physical evidence he had selected the night before in a large dumpster located near the residence of Ms. Hill, Robotic FX's Chief Operating Officer—but he held onto the electronic material, including the 100 CDROMs, the laptop computer, and the backup computer hard drives. *See id*; Docket Item No. 9, Aff. of Tom Sterner; Ex. 14 (2<sup>nd</sup> Aff. of Tomás Romano) to the Sealed Halkowski Declaration; and Ex. 9 (Second Ahed Depo. Tr.), at 38:15-39:17. That same day, Mr. Ahed also

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<sup>7</sup> Facts concerning Mr. Ahed's destruction of evidence are discussed in the Massachusetts Court's November 2, 2007, opinion granting in-part iRobot's request for preliminary injunction against Robotic FX and Mr. Ahed. *See* Ex. 14. The facts were also the subject of testimony during preliminary injunction hearings in the Massachusetts Action, and were summarized by counsel for iRobot during the opening of those hearings *See* Ex. 1, September 20, 2007 Transcript of the Preliminary Injunction Hearing in the District of Massachusetts ("09/20/07 Hearing Tr."), at 8:13-12:18.

purchased a shredder, *id.* at 38:9-12, and electronic “scrubbing” software that could be used to permanently and irretrievably remove electronic data from computer equipment. *Id.* at 58:24-59:4. Mr. Ahed then began shredding CDROM disks at Ms. Hill’s residence. *Id.* at 43:5-12. After shredding about twenty or thirty disks the shredder jammed. *Id.* at 44:13-21. At that point, Mr. Ahed disposed of the first shredder in an unspecified alley near Ms. Hill’s residence. Docket Item No. 17 (Hill Depo Tr.), at 22:3-14; *see also* Ex. 9 (Second Ahed Depo Tr.), at 47:19-48:15. Mr. Ahed and Ms. Hill proceeded to a second office supply store to purchase a second more powerful shredder. *Id.* at 44:24-45:4, 49:7-9. Mr. Ahed used the second shredder to destroy the remainder of the 100 CDROMs he had taken from Robotic FX offices. *Id.* at 49:12-50:3.

After shredding all of the approximately 100 CDROM disks, Mr. Ahed ran a scrubbing software program on his old laptop computer, to permanently and irrevocably erase all the information on that computer. *Id.* at 50:15-19, 57:1-20. Mr. Ahed admitted that this laptop was normally stored at the Robotic FX office, had data relating to his development of Robotic FX’s Negotiator robot (*see* Ex. 2, (9/24/07 Unsealed Hearing Tr.) at 243:6-13, 244:15-20; Ex. 9, (Second Ahed Depo. Tr.) at 51:15-52:16), and that he had specifically taken it from the office on the evening of August 17, 2007, along with the other items to be discarded. *Id.* at 51:24-52:7. During that same weekend, Mr. Ahed also: (i) erased data from three external computer hard drives that had large capacities of over 100 gigabytes, *id.* at 67:8-68:2, 69:11-70:21, 73:24-74:2; 8

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<sup>8</sup> To put Mr. Ahed’s actions in perspective, destruction of a mere 60 megabytes of data from a hard drive has been described as being “the equivalent of 29,297 typewritten pages.” *RKI, Inc. v. Grimes*, 177 F.Supp.2d 859 (N.D. Ill. 2001). Here, Mr. Ahed destroyed *at least* six thousand times as much data. If this information was printed and stacked, it would reach more than ten miles into the sky. If Mr. Ahed had shredded this paper at the rate of one page per second, it would have taken him five and one-half years to destroy it – even assuming he worked 24 hours a day, 7 days a week (and took no breaks to buy new shredders).

and (ii) ran the data scrubber software on his current laptop computer to clean all the “free space” on the computer, permanently destroying any evidence of files he had previously sought to delete, *id.* at 79:5-14, 80:22-81:2.<sup>9</sup> *See also* Ex. 12 (PI Op. (public)) at 10-14.

On Monday, August 20, 2007, Mr. Ahed then went back to the Robotic FX office, and ***again*** ran the data scrubber software on his office computer to clean all the “free space” on that computer and destroy any evidence of files he had previously sought to delete. *Id.* at 76:22-77:18.

After learning of Mr. Ahed’s tossing of evidence in the dumpster, iRobot immediately sought emergency relief from the Court to prevent Robotic FX from further destroying evidence<sup>10</sup> and the Court entered the TRO on August 20, 2007. Docket Item No. 6. That order prohibits Robotic FX and its officers and employees from “failing to preserve all evidence, information, data and documents” regarding, *inter alia*, Robotic FX’s allegedly infringing Negotiator robot. *Id.*

On August 21, 2007, pursuant to this Court’s TRO, iRobot attorneys and computer forensic personnel accompanied by the U.S. Marshals searched the offices of Robotic FX and the residences of Mr. Ahed and Ms. Hill. Ex. 8, Halkowski Aff., at Ex. K, August 23, 2007 Transcript of Hearing on Motion to Modify Temporary Restraining Order. iRobot counsel and U.S. Marshals first searched Robotic FX’s offices, and then proceeded to Mr. Ahed’s residence.

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<sup>9</sup> When a file is “deleted” on a computer using typical keyboard commands, a copy of the “deleted” file still remains in what is often referred to as “free space” of the computer. The “deleted” file can still be retrieved by someone with the proper software tools. Once a special scrubbing program is run on the computer, such as the one used by Mr. Ahed, all traces of any previously “deleted” files is irretrievably removed.

<sup>10</sup> The facts concerning Mr. Ahed’s attempted destruction of evidence are fully set forth in iRobot’s Ex Parte Motion for Temporary Restraining Order Preserving Evidence and Expediting Discovery and accompanying filings. *See* Docket Item Nos. 3 and 9.

Ms. Hill's residence, located a little less than an hour away from Mr. Ahed's residence, was the last location to be searched. Before iRobot counsel and the U.S. Marshals drove from Mr. Ahed's residence and reached Ms. Hill's residence, Mr. Ahed and Ms. Hill had arrived at the scene. Mr. Ahed had already entered the residence via a back-alley. And, before the Marshals, forensic experts or counsel for both parties had entered the residence, Mr. Ahed went to a rear bedroom, unplugged the laptop that had been running the scrubbing program, put the laptop in its case, closed the case, and hid the laptop under Ms. Hill's bed. *See* Ex. 9, (Second Ahed Depo. Tr.) at 96:3-97:1; *see generally id.* at 89:17-102:18. Mr. Ahed admitted that he knew that hiding the laptop under the bed would make it more difficult to find and did so with the intention of concealing the laptop from the Marshals. *Id.* at 97:5-8. Mr. Ahed further admitted that when Ms. Hill's residence was first being searched, he heard Ms. Hill advise that there were no additional laptops in the residence, other than her personal laptop, which was sitting on the kitchen counter. *Id.* at 97:12-24; *see also* Docket Item No. 17, Deposition Transcript of Kimberly Hill ("Hill Depo."), at 126:1-127:22. Mr. Ahed also conceded that he did not correct Ms. Hill's erroneous representation and advise anyone of the laptop computer he had hidden under the bed. *See* Ex. 9, (Second Ahed Depo Tr.), at 97:9-24. As the Massachusetts Court stated:

Neither [Ahed] nor Hill mentioned the presence of the laptop to the Marshals. *Id.* at 262. Ahed was clearly attempting to conceal the laptop from the search ....

Ex. 12 (PI Op. (public), at 14. Moreover, during the August 21<sup>st</sup> searching with the U.S. Marshals, "Ahed did not mention his previous destruction of evidence to anyone present." *Id.* at 13.

To excuse his actions, Mr. Ahed initially suggested that he did not have the chance to correct Ms. Hill's statement because the hidden laptop was found within a few minutes of Ms. Hill's response. *Id.* at 97:23-98:9. In reality, nearly twenty-five minutes elapsed from when Ms. Hill denied the existence of other computers in the residence until the computer forensic expert finally located the laptop computer that Mr. Ahed hid underneath Ms. Hill's bed. *See* Ex. 11, Declaration of Ronald Weiss ("Weiss Decl."), at ¶ 5. When Mr. Ahed was confronted with evidence of the lengthy period of time that he remained silent while Ms. Hill's residence was being searched before the hidden old laptop was finally uncovered, Mr. Ahed backtracked a bit and said he was not looking at his watch, and that he couldn't accurately recall the time lapse. *See* Ex. 2, (9/24/07 Unsealed Hearing Tr.) at 266:10-13. In any event, Mr. Ahed has no explanation as to why he did not correct Ms. Hill's statement that was provided in response to a direct inquiry about additional computers.

During his deposition on September 19, 2007, Mr. Ahed also explained that he collected the 100 CDROMs of data from his office because he was "concerned that for some time" that he was being "followed around," and that "someone would come in and steal [his] work." *See* Ex. 9, (Second Ahed Depo Tr.) at 24:16-20. Mr. Ahed further explained that various items of iRobot physical evidence discarded into the dumpster were "memorabilia" that he wanted to destroy because he was "angry," "upset," and "frustrated that iRobot was coming after [him] at this point when [they – Robotic FX and iRobot] became competitors in [the XBot competition]." *Id.* at 24:23-25:6.

On October 3, 2007, the fourth and final day of the Massachusetts Preliminary Injunction hearing, Mr. Ahed, for the first time since the filing of this lawsuit, provided yet another excuse

for his actions: Mr. Ahed claimed that the lawsuit, in conjunction with his stress from work caused him to “snap.” *See* Ex. 4, October 3, 2007 Transcript of Preliminary Injunction Hearing in the District of Massachusetts (“10/3/07 Hearing Tr.”), at 528:22-529:8. Mr. Ahed then claimed that the “snapping” led to all of his activities pertaining to the systematic spoliation, destruction and deletion of evidence—which occurred over a period of several days and involved multiple premeditated actions. *Id.* at 548:6-11. Prior to this testimony on the final day of the Preliminary Injunction Hearing, Mr. Ahed had not once mentioned his “snapping” theory—not during either of his two days of depositions on August 27<sup>th</sup> and September 19<sup>th</sup> nor in any of the multiple papers filed in Massachusetts regarding Mr. Ahed’s destruction of evidence. *See* Ex. 12 (PI Op. (sealed)), at 30 (rejecting Mr. Ahed’s “snapping” excuse and finding his actions to have been “deliberate and extensive”).

## **II. MR. AHED’S EFFORTS TO INTENTIONALLY DISPOSE OF EVIDENCE – EVEN AFTER READING THIS COURT’S TRO – WARRANT IMPOSITION OF SANCTIONS**

District courts have broad discretion to sanction discovery abuses pursuant to Fed. R. Civ. P. 37.<sup>11</sup> *Gratton v. Great American Commc’ns*, 178 F.3d 1373, 1374 (11th Cir. 1999). Under Rule 37, a Court may impose, *inter alia*, the following types of sanctions: (1) ordering designated facts to be taken as established; (2) preventing the offending party from supporting or opposing

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<sup>11</sup> Federal courts also have broad discretion to sanction parties using their inherent power to fashion and impose appropriate sanctions for conduct that abuses the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991); *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005)(citing *id.*). District courts may sanction parties for abuses of the discovery process, including, for example, spoliation, which is defined as “an attempt by a party to suppress or destroy material evidence favorable to the party’s adversary.” *Pioneer Services, Inc. v. Auto-Owners Insurance Co., Inc.*, 2007 WL 2059109, at \*6 (M.D. Ala. July 12, 2007) (citation omitted); *see also Hester v. Bayer*, 206 F.R.D. 683, 685 (M.D. Ala. 2001) (quotations omitted); *United States Steel, LLC v. TIECO, Inc.*, 261 F.3d 1275, 1280, 1294 (11th Cir. 2001) (affirming award of sanctions but reversing and vacating other elements of final judgment).

designated claims or defenses, or prohibiting introduction of evidence; (3) rendering judgment by default against the offending party; (4) awarding monetary sanctions, including reasonable expenses and attorneys' fees. *USX Corp. v. TIECO, Inc.*, 189 F.R.D. 674, 678 (N.D. Ala. 1999); Fed. R. Civ. P. 37(b)(2); 37(c). Courts may also impose the sanction of an adverse inference, which permits the jury to assume that destroyed evidence would have been unfavorable to the position of the offending party. *See, e.g., Martinez v. Brink's, Inc.*, 171 Fed.Appx. 263, 265 n.3 (11th Cir. 2006).

At this juncture, iRobot presents a limited request to Your Honor for the award of monetary sanctions against Robotic FX for at least the costs and fees incurred to perform the significant legal and investigative costs that iRobot was compelled to undertake as a consequence of Robotic FX's willful destruction of evidence. For example, when iRobot learned of Mr. Ahed's attempts to discard physical evidence in a dumpster on August 18, 2007, it was forced to immediately seek a restraining order to enjoin further destruction of evidence.<sup>12</sup> After obtaining a TRO from this Court, iRobot bore substantial additional costs in enforcing the Court's order, retaining computer forensics experts on short notice to assist in search and seizure of evidence at Robotic FX's offices and the residences of Mr. Ahed and Ms. Hill, imaging the hard drives of seized computers, maintaining seized data in escrow per agreement with counsel for Robotic FX, and deposing several Robotic FX employees, including Mr. Ahed himself, in connection with Mr. Ahed's destruction of evidence. iRobot incurred additional legal fees in subsequent

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<sup>12</sup> Spoliation of evidence is viewed as an extreme form of discovery abuse that "strikes at the core of our civil litigation system." *Danis v. USN Comms., Inc.*, 53 Fed. R. Serv.3d 828, 829 (N.D. Ill. 2000). District courts have derided spoliation as "the most egregious variant of nonproduction," *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 558 n.4 (N.D. Cal. 1987), and as "inflict[ing] the ultimate prejudice." *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990).

proceedings before this Court, arguing Robotic FX's Motion to Clarify or Modify the TRO (Docket Item No. 11), and a rehearing on the TRO (Docket Item No. 13). iRobot could have avoided much of this effort and saved the bulk of the related costs, if Mr. Ahed had been forthcoming about his efforts to dispose of and destroy evidence when the U.S. Marshals first arrived at Robotic FX's offices. Mr. Ahed chose not to do so and, in fact, after reading the TRO he undertook additional actions to further his efforts to hide and/or destroy evidence. Thus, the course of conduct by Mr. Ahed to conceal and destroy evidence, including his violation of the Court's TRO, ultimately caused iRobot to incur significant costs and legal fees.

Mr. Ahed's course of conduct warrants imposition of additional sanctions including at a minimum imposition of adverse inferences regarding iRobot's claims and even extending to an issuance of a default judgment against Robotic FX. However, because this matter has been assigned to a Judge other than Your Honor (who has addressed the spoliation issues regarding this matter from the outset and who previously issued the TRO), iRobot respectfully defers to Your Honor regarding the most appropriate way to present the additional sanctions concerning the underlying merits of the claims asserted by iRobot.

As for monetary sanctions, district courts have not hesitated to award such relief — even in addition to other more severe sanctions — to compensate parties for fees and expenses incurred in investigating and pursuing legal remedies for destruction of evidence. For example, the District Court for the Southern District of Florida, in *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987), considered destruction of evidence highly analogous, with respect to the level of culpability attributable to a single corporate employee, to Mr. Ahed's destruction of evidence in this case. The *Telectron* court recognized the defendant's conduct as

unambiguously knowing and malicious: “Defendant’s actions were unequivocally motivated by the flagrant bad faith of [defendant’s employee] who explicitly and urgently called for the destruction of records in a category directly related to the opposing party’s claims, on the very date that he became aware of those claims.” *Id.* at 134. With that backdrop, the *Telectron* court found that the defendant’s willful destruction of evidence warranted multiple sanctions, including monetary sanctions.

One lesser sanction which we have seen fit to impose as a partial remedy is the payment of all reasonable attorneys’ fees and costs incurred by [plaintiff] in ferreting out the nature, extent and source of the destruction which occurred. We apply this sanction in order to encourage wronged parties such as [plaintiff] to take the steps necessary to uncover misconduct carried out against them in the course of litigation under the aegis of the Court.

*Id.* at 135. The same considerations that the *Telectron* court cited in support of imposing monetary sanctions against Robotic FX and Mr. Ahed for the knowing and malicious destruction of evidence here.<sup>13</sup>

### **III. CONCLUSION**

For the reasons discussed above, iRobot respectfully requests that the Court find Robotic FX and Mr. Ahed in contempt for Mr. Ahed’s violation of the TRO and impose monetary sanctions against Robotic FX and Mr. Ahed. Also, given the status of this matter, iRobot respectfully seeks the Court’s guidance as to how to present its requests for merits-related sanctions, including: (i) the issuance of a default judgment, to penalize Robotic FX for the

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<sup>13</sup> Notably, the *Telectron* court found imposition of monetary sanctions inadequate to compensate the plaintiff for prejudice that it sustained as a consequence of the defendant’s intentional destruction of evidence. “This measure [i.e. monetary sanctions] standing alone, however, falls far short of making the wronged party whole, as it does not compensate [plaintiff] for the irretrievable loss of evidence potentially crucial to its substantive claims.” *Id.*

egregious nature of Mr. Ahed's knowing and malicious spoliation of evidence as well as to deter others from seeking to avoid an adverse judgment by destroying evidence; or, alternatively, (ii) the imposition of adverse-inference sanctions, including that the jury be instructed that the evidence Mr. Ahed destroyed is presumed to be unfavorable to Robotic FX.

DATED: November 5, 2007

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system. In the event that the CM/ECF system does not send notification of such filing to the following, undersigned counsel will serve the following via U.S. Mail.

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This 5<sup>th</sup> day of November, 2007.

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