

1 GIBSON, DUNN & CRUTCHER LLP
 G. CHARLES NIERLICH, SBN 196611
 2 HOWARD S. HOGAN, *pro hac vice*
 JOSHUA A. JESSEN, SBN 222831
 3 555 Mission Street, Suite 3000
 San Francisco, CA 94105-2933
 4 Telephone: 415.393.8200
 Facsimile: 415.393.8306
 5 gnierlich@gibsondunn.com
hhogan@gibsondunn.com
 6 jjessen@gibsondunn.com

KING PARRET & DROSTE LLP
 ALAN J. DROSTE, SBN 105616
 450 Newport Center Drive, Suite 500
 Newport Beach, CA 92660
 Telephone: 949.644.3484
 Facsimile: 949.644.3993
adroste@kpdlex.com

[Additional counsel on signature pages]

7 Attorneys for Plaintiff
CYTOSPORT, INC.

Attorneys for Defendant
VITAL PHARMACEUTICALS, INC.

9 UNITED STATES DISTRICT COURT
 10 EASTERN DISTRICT OF CALIFORNIA
 11 SACRAMENTO DIVISION

13 CYTOSPORT, INC., a California corporation,
 14 Plaintiff,
 15 v.
 16 VITAL PHARMACEUTICALS, INC., a
 17 Florida Corporation,
 18 Defendant.

CASE NO. 2:08-CV-02632-JAM-GGH

AGREED STIPULATION AND ORDER OF DISMISSAL

1 This matter is before the Court on the joint application of plaintiff CytoSport, Inc.
2 (“CytoSport”) and Defendant Vital Pharmaceuticals, Inc. (“VPX”) (collectively, “the Parties”).

3 WHEREAS, Plaintiff commenced the above-captioned civil action on or about November 4,
4 2008 and filed a Third Amended Complaint on or about December 7, 2009;

5 WHEREAS, Defendant filed an answer and counterclaims against CytoSport that were
6 deemed filed as of December 22, 2009;

7 WHEREAS, the Parties have entered into a confidential settlement agreement in which they
8 have agreed to resolve the dispute giving rise to this action; and

9 WHEREAS, without admitting any factual or legal allegation, claim alleged, or defense
10 asserted, the Parties have consented to the entry of this dismissal order pursuant to Rule 41(a)(2) of
11 the Federal Rules of Civil Procedure with prejudice.

12 Therefore, it is hereby ORDERED that:

13 (a) All claims asserted by Plaintiff against Defendant and all counterclaims asserted by
14 Defendant against Plaintiff are hereby dismissed with prejudice;

15 (b) The preliminary injunction entered by this Court on May 6, 2009 and affirmed by
16 order of the United States Court of Appeals for the Ninth Circuit dated September 14, 2009 and filed
17 October 13, 2009 is hereby converted into a permanent injunction and the terms of the injunction set
18 forth therein shall remain permanently in effect pursuant to 15 U.S.C. § 1116 except that CytoSport is
19 hereby relieved of its obligation to post a security under Rule 65(c) of the Federal Rules of Civil
20 Procedure. The Surety Bond in the amount of \$500,000.00 received by attorney-in-fact Sheryl
21 Smith/American Contractors Indemnity Company and recorded as Docket No. 78 is accordingly
22 hereby discharged and exonerated.

23 (c) As set forth in the confidential settlement agreement between the Parties, VPX
24 surrenders and abandons all statutory and common law rights in the marks “Muscle Power” (Reg.
25 Nos. 3,551,076 and 3,547,541) and “I Am Muscle Power” (Serial No. 77/679,693), along with any
26 and all of the goodwill associated with and represented and symbolized by such marks. The Court
27 hereby orders the cancellation of Reg. Nos. 3,551,076 and 3,547,541 and certifies such order to the
28 Director of the United States Patent and Trademark Office “who shall make appropriate entry upon

1 the records of the Patent and Trademark Office and shall be controlled thereby,” pursuant to 15
2 U.S.C. § 1119;

3 (d) As set forth in the confidential settlement agreement between the Parties, VPX
4 withdraws its petitions to cancel CytoSport’s registrations for the “Muscle Milk” and “Muscle Milk
5 Light” marks, Petition for Cancellation Nos. 92051604, 92051605, 92051607 and 92051697 before
6 the Trademark Trial and Appeal Board of the United States Patent and Trademark Office;

7 (e) Each of the Parties shall bear its own costs, expenses and attorneys’ fees associated
8 with the prosecution and defense of this action;

9 (f) Any and all motions that remain pending on the docket for this action are hereby
10 denied as moot;

11 ///

12 ///

13 ///

1 (g) This Court shall retain subject matter jurisdiction over this matter for purposes of
2 enforcement of this order and the Parties' settlement of this action, and the Parties hereby expressly
3 consent to the exclusive personal jurisdiction of this Court with respect to any action arising from or
4 related to this Settlement Agreement; and

5 (h) The Clerk of the Court is directed to close the above-captioned action.

6 DATED: September 27, 2012

7
8 GIBSON, DUNN & CRUTCHER LLP
9 G. CHARLES NIERLICH
10 HOWARD S. HOGAN
11 JOSHUA A. JESSEN

KING, PARRET & DROSTE LLP
ALAN J. DROSTE

VITAL PHARMACEUTICALS, INC.
KALINA PAGANO
VICTORIA GODWIN

12
13 By: /s/ G. Charles Nierlich
G. Charles Nierlich

By: /s/ Alan J. Droste
Alan J. Droste

14 Attorneys for Plaintiff
15 CYTOSPORT, INC.

Attorneys for Defendant
VITAL PHARMACEUTICALS, INC.

16
17 IT IS SO ORDERED.

18
19 Dated: 9/28/2012

20 /s/ John A. Mendez
21 U. S. DISTRICT COURT JUDGE