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6 Counsel for Debtor,  
KINEMED, INC., a Delaware Corporation

8 IN THE UNITED STATES BANKRUPTCY COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 OAKLAND DIVISION

11 In re  
12 KINEMED, INC., a Delaware  
13 corporation,  
14  
15 Debtor.  
16 Federal Tax I.D. No.: 91-2104596

Case No. 16-41241-CN  
Chapter 11  
Date: June 8, 2017  
Time: 10:00 a.m.  
Place: U.S. Bankruptcy Court  
Courtroom No. 215  
1300 Clay Street  
Oakland, California  
Judge: Honorable Charles Novack

19 **DEBTOR'S MOTION FOR APPROVAL OF (A) SALE,**  
20 **ASSUMPTION AND ASSIGNMENT OF SYNTHETIC GHRELIN LICENSE FREE**  
21 **AND CLEAR OF DIP LENDER'S LIEN; AND (B) COMPROMISE OF CONTROVERSY**

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. JURISDICTION .....2

III. STATEMENT OF FACTS .....2

A. General Background .....2

B. The Transferred Assets .....3

C. Disputes Arising Under the BPF License .....4

D. Liens Encumbering The Debtor’s Assets .....5

E. MidCap Settlement Agreement.....5

F. Proposed Terms of Oxeia Transaction.....6

G. Debtor’s Anticipated Reorganization .....7

IV. RELIEF REQUESTED.....8

V. DISCUSSION .....8

A. Sale Under Section 363(b) .....8

B. Free And Clear Of Liens.....10

C. Assumption And Assignment Under Section 365 .....10

1. Business Judgment Rule 11

2. Assumability and Assignability of BPF License 11

3. Cure Payments 12

4. Adequate Assurance of Future Performance 12

D. Good Faith Determination Under Section 363(m).....13

E. Release Of Claims Under Assignment Agreement.....13

VI. NOTICE.....15

VII. CONCLUSION.....15

**TABLE OF AUTHORITIES**

**Federal Cases**

*In re 240 N. Brand Partners, Ltd.*, 200 B.R. 653, 659 (9th Cir. BAP 1996).....9

*In re A&C Properties*. 784 F.2d at 1381.....14

*In re Bankvest Capital Corp.*, 360 F.3d 291, 296 (1st Cir. 2004) .....11

*In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9<sup>th</sup> Cir. 1999).....12

*In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991).....9

*In re Drexel Burnham Lambert Grp., Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991) .....14

*In re Elliot*, 94 B.R. 343, 345 (Bankr.E.D.Pa.1988).....10

*In re Equity Funding Corp. of America*, 492 F.2d 793, 794 (9th Cir.).....9

*In re Ewell*, 958 F.2d 276, 281 (9th Cir. 1992).....13

*In re Fearing*, 143 F. App'x 744, 746 (9th Cir. 2005) .....13

*In re Hernandez*, 285 B.R. 435, 438 (Bankr. Ariz. 2002) .....12

*In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983) .....9

*In re Orion Pictures Corp.*, 4 F.3d 1095, 1098 (2d Cir. 1993).....11

*In re U.S. Wireless Data, Inc.*, 547 F.3d 484, 488 (2d Cir. 2008) .....11

*In re WPRV-TV*, 983 F.2d 336, 340 (1st Cir. 1993).....9

*Martin v. Kane (In re A&C Properties)*, 784 F.2d 1377, 1380-81 (9th Cir. 1986) .....13, 14

*N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145, 129 S. Ct. 1577, 173 L. Ed. 2d 1028  
 (2009).....12

*Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985).....11

**Statutes**

11 U.S.C. § 105(a) .....9

11 U.S.C. § 363(b) .....8, 9

11 U.S.C. § 363(b).....8

11 U.S.C. § 363(m).....13

1 11 U.S.C. § 365(b)(1)(A).....12  
2 11 U.S.C. § 365(c)(1)(A)-(B) .....11, 12  
3 **Rules**  
4 F.R.B.P. 9019(a) .....14, 15, 16  
5  
6  
7  
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9  
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**I. INTRODUCTION**

By this motion (this “Motion”), KINEMED, INC., the debtor-in-possession herein (the “Debtor”), moves the above-titled Bankruptcy Court for an order, pursuant to the provisions of Sections 105(a), 363(b), 363(f), 365(b) and 365(f) of Title 11 of the United States Code (the “Bankruptcy Code”), and Rules 2002, 6004, 6006 and 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) authorizing and approving the following:

(a) The sale to OXEIA BIOPHARMACEUTICALS, INC., a Delaware corporation (“Oxeia”), of the Debtor’s rights as licensee, under the *BPF KineMed License Agreement SUN 11031 (Synthetic Ghrelin)* dated as of February 2016 (the “BPF License”), including all rights under a related IND approved by the U.S. Federal Drug Administration (“FDA”) and rights to purchase certain batches and supplies of the licensed compound (synthetic ghrelin) from a manufacturer (the “Related Rights”), entered into between the Debtor and BIOPHARMA FOREST, INC., a stock company formed under the Companies Act of Japan (“BPF”), pursuant to a certain *Assumption And Assignment Agreement (SUN 11031)* (the “Assignment Agreement”) and the provisions of Sections 363(b) and (f) of the Bankruptcy Code, free and clear of all liens of the Debtor’s postpetition lender (as described below);

(b) The assumption of all of the Debtor’s rights under the BPF License and the Related Rights, and assignment of all such rights to Oxeia pursuant to the Assignment Agreement and the provisions of Sections 365(b) and (f) of the Bankruptcy Code; and

(c) A compromise of controversies between the Debtor and BPF whereby the parties release any and all claims against each other, including any and all liabilities or payments under the BPF License due and owing by the Debtor, and any claims related to payments made by the Debtor to BPF that could be considered avoidable preferences under the provisions of Section 547(b) of the Bankruptcy Code, pursuant to Rule 9019 of the Bankruptcy Rules.

A copy of the Assignment Agreement is attached as **Exhibit “A”** to the declaration of David

1 M. Fineman (the “Fineman Dec.”) filed concurrently herewith. David M. Fineman is the Debtor’s  
2 Chief Executive Officer and Chairman of its Board of Directors.

3 **II. JURISDICTION**

4 This Court has jurisdiction to hear and determine this Motion, pursuant to Sections 1334 and  
5 157 of Title 28 of the United States Code. The Court’s consideration of this Motion is a core  
6 proceeding under Section 157(b) of Title 28 of the United States Code. Venue of this proceeding is  
7 proper in this district under Sections 1408 and 1409 of Title 28 of the United States Code. The  
8 statutory authority for this Motion is found in Sections 363 and 365 of the Bankruptcy Code, and  
9 Rule 9019 of the Bankruptcy Rules.

10 **III. STATEMENT OF FACTS**

11 The following facts are established by the record of this Court, the Fineman Dec. and the  
12 declaration of Kartik Shah, the President and a Director of Oxeia (the “Shah Dec.”), filed  
13 concurrently herewith:

14 **A. General Background**

15 1. The Debtor, founded in 2001, is incorporated under the laws of the State of Delaware,  
16 and formerly operated from its principal place of business located in Emeryville, California.

17 2. The Debtor filed its voluntary petition for relief under chapter 11 of the Bankruptcy  
18 Code on May 4, 2016 (the “Petition Date”). The Debtor continues to operate its business as a debtor  
19 in possession pursuant to the provisions of Sections 1107(a) and 1108 of the Bankruptcy Code, no  
20 trustee having been appointed.

21 3. The Debtor’s chapter 11 petition was filed after its secured lender, Midcap Financial  
22 Trust, as successor agent to MidCap Funding V, LLC (“MidCap”), served on the Debtor notice of an  
23 intended foreclosure sale of the Debtor’s assets, scheduled for May 5, 2016.

24 4. Prior to the Petition Date, the Debtor was focused on applying its assays of metabolic  
25 process across a host of diseases in order to de-risk and advance drug development, with a particular  
26 focus on muscle-wasting diseases and fibrotic diseases. The Debtor’s primary assets were  
27 encompassed in an exclusive license (the “Platform License”) of biomarker platform technology  
28 developed by the Debtor (the “Platform Technology”). On February 3, 2017, the Court entered its

1 order (docket no. 153) granting the *Debtor's Motion (A) Sale of Biomarker Platform Technology Free*  
2 *and Clear of Liens; and (B) Assumption and Assignment of Platform License*, and authorizing the  
3 Debtor to sell and assign to GlaxoSmithKline Intellectual Property Development Limited ("GSK") the  
4 Platform License in exchange for a cash purchase price and a sublicense of the Platform Technology  
5 back to the Debtor. The Debtor is in the process of completing that approved sale, which is expected  
6 to close in May 2017.

7           5.       The recent completion of the approved sale to GSK resulted in full satisfaction of the  
8 Debtor's secured obligations owing to MidCap, pursuant to a compromise agreement between the  
9 Debtor and MidCap, as earlier approved by the Court. The sale also produced net cash proceeds for  
10 the estate.

11           6.       The Debtor intends to reorganize through a plan of reorganization, coupled with new  
12 investment capital and based on development of new proprietary drugs through the use of the Platform  
13 Technology sublicensed from GSK. The sale and assignment proposed in this Motion will assist in  
14 preparation of a plan of reorganization by providing the Debtor with additional net cash proceeds, to  
15 be used either for the reduction of its postpetition secured financing, as described below, or for  
16 development purposes.

17 **B.       The Transferred Assets**

18           7.       Among the Debtor's other intellectual property assets are its rights as a licensee under  
19 the BPF License and the Related Rights (collectively, the "Transferred Assets"), with respect to a  
20 compound known as synthetic ghrelin or SUN 11031 ("SUN 11031"). SUN 11031 is an appetite-  
21 stimulating agent for possibly treating involuntary weight loss in Lou Gehrig's Disease ("ALS") and  
22 in the elderly, among other conditions. SUN 11031 has been approved by the FDA for entry into  
23 Phase 2 clinical trials in ALS. In addition to the compound's FDA approval of testing for treatment  
24 in ALS, the Debtor believes that SUN 11031 has additional potential uses in treating weight loss  
25 associated with anorexia of aging, chronic obstructive pulmonary disease, and patients in intensive  
26 care due to hip fracture.

27           8.       The Related Rights include the IND (investigational new drug) application approved  
28 by the FDA that entitles the Debtor to commence Phase 2 clinical trials of SUN 11031, and also

1 includes as certain rights to purchase batches or samples of the compound from its manufacturer.<sup>1</sup>

2 9. The Debtor believes that development of SUN 11031 has great potential, and that the  
3 approved IND is of substantial value. However, the Debtor lacks the substantial capital that would be  
4 required to develop and de-risk the compound, which would require several years to complete. In  
5 addition, the BPF License contains significant deadlines for drug development and financing that the  
6 Debtor is unable to satisfy. Assumption of the BPF License without concurrent assignment to a third  
7 party with sufficient ability to perform under the license is therefore not feasible.

8 10. In addition, assumption or assignment of the BPF License without the consent of BPF  
9 would be problematic. The license permits assignment by the Debtor only with the consent of BPF,  
10 unless the assignment is part of a restructuring of the Debtor. Inasmuch as the Debtor intends to  
11 assign the license prior to the filing of its reorganization plan, BPF might contest such assignment, if  
12 not made with its consent, outside of a filed plan.

13 11. Accordingly, in its chapter 11 case, the Debtor has sought an appropriate party to  
14 purchase its rights under the BPF License, with the cooperation of BPF. Those efforts identified two  
15 parties that made written proposals for the purchase of those rights. One of those two proposals, made  
16 by Oxeia, was significantly higher and better than the other proposal, upon terms approved by BPF.  
17 The Debtor therefore entered into further negotiations with Oxeia and BPF, and Oxeia conducted and  
18 completed its due diligence, resulting in the Assignment Agreement, described below.

19 **C. Disputes Arising Under the BPF License**

20 12. Among the Debtor's obligations as a licensee under the BPF License is the obligation  
21 to commence development, and demonstrate adequate funding therefor, by deadlines set in the license.  
22 The Debtor cannot meet those deadlines, and BPF alleges that the Debtor is in default on that basis as  
23 well as other grounds.

24 13. The Debtor believes that in the event of rejection of the BPF License, BPF would be  
25 liable for the return of a payment made by the Debtor on April 18, 2016, within 90 days prior to the

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27 <sup>1</sup> Oxeia and BPF have requested that the precise terms of the IND application and compound supplies be kept  
28 confidential. Therefore, those details have not been included in this Motion, but would be available to a third party under  
strict confidentiality terms, upon delivery of a full, credible and binding noncontingent offer to purchase the Debtor's  
rights under the BPF License upon terms acceptable to the Debtor, accompanied by fully documented proof of ability and  
intent to close and capable of being approved under Section 365 of the Bankruptcy Code.



1 Petition Date, in the amount of \$51,078.60, pursuant to the avoidance provisions of Section 547(b) of  
2 the Bankruptcy Code. The Debtor believes that such preference liability would be contested by BPF.

3 14. As described below, the Debtor and BPF have agreed to release each other from any  
4 existing liabilities, including any liabilities arising from the BPF License or allegedly preferential  
5 transfers, as a compromise incorporated into the terms of the Assignment Agreement.

6 **D. Liens Encumbering the Debtor's Assets**

7 15. In December 2014, the Debtor entered into a loan agreement with MidCap. The loan  
8 is secured by all of the Debtor's tangible and intangible personal property, which include the BPF  
9 License. As discussed below, the Debtor has entered into a settlement agreement with MidCap that  
10 provides for the reduction and elimination of MidCap's claim and liens, and that agreement has been  
11 approved by the Court.

12 16. Following the Petition Date, on June 7, 2016, the Court entered its final order  
13 approving a secured postpetition loan provided by KINEMED DIP LENDERS, LLC (the "DIP  
14 Lender"), a limited liability company composed of certain of the Debtor's shareholders. In  
15 conjunction with the postpetition financing, the Debtor and the DIP Lender entered into a loan  
16 agreement, a secured promissory note, and a security agreement. As approved by the Court, the DIP  
17 Lender's liens encumber all of the Debtor's tangible and intangible personal property, including the  
18 BPF License.

19 17. It is the Debtor's understanding that the DIP Lender presently asserts a balance in  
20 excess of \$570,000 owing under its loan, including principal, interest and allowed fees and other  
21 charges. As reflected in the DIP Lender's counsel's letter dated April 7, 2017, a copy of which is  
22 attached to the Fineman Dec. as **Exhibit "B,"** the DIP Lender has consented to a sale and assignment  
23 of its collateral to Oxeia, pursuant to the Assignment Agreement, free and clear of its liens, provided  
24 that the net proceeds of such sale shall be encumbered by such liens to the same extent, priority and  
25 validity as presently exist.

26 **E. MidCap Settlement Agreement**

27 18. As of October 24, 2016, the Debtor entered into a settlement agreement (the "MidCap  
28 Agreement") with MidCap, subject to Court approval. On December 2, 2016, the Court entered its

1 order (docket no. 153) approving the MidCap Agreement pursuant to the provisions of Bankruptcy  
2 Rule 9019.

3 19. Under the terms of the MidCap Agreement, MidCap agreed to accept the amount of  
4 \$1,000,000 in full satisfaction of its secured claim of roughly \$4,000,000. Of that amount, \$500,000  
5 was paid earlier to MidCap from the Debtor's cash collateral account, leaving only \$500,000 to be  
6 paid to MidCap from the net sale proceeds of the Platform License. That remaining amount was paid  
7 to MidCap upon the closing of the GSK sale, on May 2, 2017. Accordingly, MidCap no longer holds  
8 any lien against the BPF License, and therefore there is no need to sell free and clear of MidCap's  
9 lien.

10 **F. Proposed Terms of Oxeia Transaction**

11 20. Under the terms of the Assignment Agreement, the Debtor, Oxeia and BPF have  
12 agreed upon the following terms of sale and assignment, subject to Bankruptcy Court approval:<sup>2</sup>

13 (a) Assignment of BPF License: The Debtor shall also assume and assign to  
14 Oxeia the BPF License and the Related Rights, and BPF will consent to such assumption and  
15 assignment. All post-closing obligations of the licensee under the BPF License will be the  
16 sole responsibility of Oxeia.

17 (b) Consideration Paid to Debtor: Concurrent with the assignment of the license  
18 to Oxeia, Oxeia will pay to KineMed the sum of \$350,000.00 as consideration therefor. In  
19 addition, in the event that Oxeia purchases certain supplies or batches of SUN 11031 from  
20 BPF or the manufacturer, either at closing or in the future, Oxeia will pay to the Debtor the  
21 additional consideration of \$125,000.00.

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27 \_\_\_\_\_  
28 <sup>2</sup> This description is in summary terms only, and parties in interest are encouraged to review the Assignment Agreement  
itself for additional details.

1 (c) Amendment of License: Concurrent with the assignment of the BPF License  
2 to Oxeia, Oxeia and BPF will enter into an amendment agreement, pursuant to which those  
3 parties will agree on multiple substantive and economic changes to the terms of the BPF  
4 License.<sup>3</sup>

5 (d) Release of Claims: The Debtor, Oxeia and BPF shall generally and mutually  
6 release each other from all claims, known or unknown, other than those arising under or  
7 preserved by the Assignment Agreement. Without limiting the generality of the foregoing,  
8 the mutual release will compromise all claims between the Debtor and BPF – the Debtor will  
9 effectively release any claims for preference or avoidance, and BPF will effectively release  
10 any claims of breach or delinquencies of the licensee.

11 21. As set forth in the accompanying declarations of Mr. Fineman and Mr. Shah, to the  
12 best knowledge of the Debtor and Oxeia, neither company nor BPF, nor any of their respective  
13 affiliates or employees are insiders of the other, and all negotiations between the Debtor and Oxeia  
14 have been conducted in good faith and at arms' length, without collusion or fraud.

15 **G. Debtor's Anticipated Reorganization**

16 22. The Debtor expects to propose a plan of reorganization to allow for the  
17 recapitalization of the Debtor, with its emergence from chapter 11 accompanied by a business plan  
18 capitalizing on de-risking proprietary compounds by use of the platform technology retained by  
19 sublicense within the Debtor. The plan is expected to provide for new capital for the reorganized  
20 company, together with the conversion of some or all debt to equity.

21 23. The Debtor believes that the proposed sale, assumption and assignment of the BPF  
22 License, upon the terms and conditions summarized above, are in the best interests of the estate for the  
23 following reasons: First, the proposed sale will provide an influx of cash to the Debtor. Second, the  
24 sale price is reasonable in light of the Debtor's efforts to market and sell and assign the BPF License,  
25 and the absence of any higher or better offer made to the Debtor in that marketing effort. Third, the

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27 <sup>3</sup> Oxeia and BPF have requested that the detailed terms of the amendment agreement be kept confidential. Therefore,  
28 those details have not been included in this Motion, but would be available to a third party under strict confidentiality  
terms, only upon delivery of a full, credible and binding noncontingent offer to purchase the Debtor's rights under the  
BPF License upon terms acceptable to the Debtor, accompanied by fully documented proof of ability and intent to close  
and capable of being approved under Section 365 of the Bankruptcy Code.

1 proposed sale, and assignment of the BPF License and BPF Patents to Oxeia will enable the Debtor to  
2 proceed to recapitalize and reorganize itself, and to emerge from chapter 11 through a plan of  
3 reorganization. And lastly, the Debtor does not believe that assumption of the BPF License without an  
4 assignment to a third party is feasible or in the estate's best interests, for the reasons set forth above,  
5 and therefore, the proposed assumption and assignment is beneficial to the estate.

6 **IV. RELIEF REQUESTED**

7 By this Motion, the Debtor requests entry of an order of the Bankruptcy Court granting the  
8 following relief:

9 A. Approving the sale, assumption and assignment of the BPF License and the Related  
10 Rights to Oxeia pursuant to the Assignment Agreement, free and clear of the DIP Lender's liens, with  
11 such liens attaching to the net proceeds of sale to the same extent of priority, validity and  
12 enforceability as presently exists against the BPF License, under Sections 105(a), 363(b), 363(f),  
13 365(b) and 365(f) of the Bankruptcy Code, and Bankruptcy Rules 6006 and 6004;

14 B. Finding that the Debtor, Oxeia and BPF have acted in good faith in connection with  
15 the proposed sale, pursuant to Section 363(m) of the Bankruptcy Code; and

16 C. Authorizing a release of claims between the Debtor and BPF, as set forth in the  
17 Assignment Agreement, pursuant to Bankruptcy Rule 9019.

18 **V. DISCUSSION**

19 The Debtor submits that based upon the foregoing facts, the relief sought herein is appropriate  
20 and well supported under applicable law. In particular:

21 **A. Sale Under Section 363(b)**

22 Section 363(b) of the Bankruptcy Code governs the sale of assets outside of the ordinary  
23 course of a debtor's business. For the reasons set forth below, the relief sought in this Motion is  
24 warranted by the provisions of that statute.

25 Section 363(b) of the Bankruptcy Code permits a debtor-in-possession to sell property of the  
26 estate other than in the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b).  
27 Further, Section 105(a) of the Bankruptcy Code allows a bankruptcy court to "issue any order,  
28 process or judgment that is necessary or appropriate to carry out the provisions of this title." 11

1 U.S.C. § 105(a). A bankruptcy court's power to authorize a sale under Section 363(b) is to be  
2 exercised at the court's discretion. *In re WPRV-TV*, 983 F.2d 336, 340 (1st Cir. 1993).

3 Although Section 363 does not set forth a standard for determining when it is appropriate for  
4 a court to authorize the sale or disposition of a debtor's assets, courts have uniformly held that  
5 approval of a proposed sale of property under Section 363(b) is appropriate if the transaction is  
6 supported by the reasonable business judgment of the debtor. *See In re Lionel Corp.*, 722 F.2d 1063  
7 (2d Cir. 1983); *see also In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)  
8 (holding that a court must be satisfied that there is a "sound business reason" justifying the  
9 preconfirmation sale of assets). The requirements of Section 363(b) are designed to protect creditors'  
10 interests in the assets of the estate. *In re 240 N. Brand Partners, Ltd.*, 200 B.R. 653, 659 (9th Cir.  
11 BAP 1996). A bankruptcy court can authorize the sale of the assets of the estate under Section  
12 363(b) upon a proper showing that there is a sound business purpose for the sale, that the sale is in the  
13 best interests of the estate, and that it was proposed in good faith. *Id.* at 659.

14 The Debtor submits that the sale of the BPF License and the Related Rights fits squarely  
15 within the parameters of the sound business judgment test set forth above for authorizing a sale  
16 outside the ordinary course of business, *see In re Equity Funding Corp. of America*, 492 F.2d 793,  
17 794 (9th Cir.), cert. denied, 419 U.S. 964 (1974).

18 First, the transaction is an essential part of the Debtor's planned emergence from chapter 11  
19 through a plan of reorganization. The transaction provides operating cash to the Debtor to continue  
20 to administer its chapter 11 case, as well as support the Debtor as it seeks investors in the reorganized  
21 debtor.

22 Second, the proposed purchase price has been shown to be fair and reasonable, in light of the  
23 Debtor's reasonable marketing efforts, and despite communications with another possible purchaser,  
24 no offer has been received by the Debtor that is better or higher than the purchase price and terms  
25 proposed in the Assignment Agreement.

26 Third, because the Debtor is unable to fulfill the obligations of the licensee under the terms of  
27 the BPF License, as described above, its only other alternative would be to reject the license, which  
28 would produce no benefit to the estate other than relief of obligations. In contrast, the Assignment

1 Agreement will result in at least \$350,000.00 of consideration for the benefit of the estate.

2 Accordingly, the Debtor submits that the proposed transaction is supported by sound business  
3 reasons, is based on reasonable sale terms that are in the Debtor's and its estate's best interests, and  
4 should be approved under the Ninth Circuit standards set forth above.

5 **B. Free And Clear Of Liens**

6 Section 363(f) of the Bankruptcy Code permits a debtor to sell property of the estate "free and  
7 clear of any interest in such property of an entity other than the estate" if one of the following  
8 conditions is satisfied:

- 9 (1) applicable nonbankruptcy law permits the sale of such property free and  
10 clear of such interest;  
11 (2) such entity consents;  
12 (3) such interest is a lien and the price at which such property is to be sold is  
13 greater than the aggregate value of all liens on such property;  
14 (4) such interest is in bona fide dispute; or  
15 (5) such entity could be compelled, in a legal or equitable proceeding, to  
16 accept a money satisfaction of such interest.

17 11 U.S.C. §§ 363(f)(1) - (f)(5). Because Section 363(f) is written in the disjunctive, satisfaction of any  
18 one condition is sufficient to sell the property "free and clear of any interest." *In re Elliot*, 94 B.R.  
19 343, 345 (Bankr.E.D.Pa.1988) ("[I]f any of the five conditions of § 363(f) are met, the Trustee has  
20 authority to conduct the sale free and clear of all liens.").

21 Here, the Debtor seeks to transfer its interests free and clear of the liens of the DIP Lender,  
22 and the DIP Lenders have consented to the transfer, assumption and assignment of the BPF License  
23 and the Related Rights free and clear of their liens, satisfying Section 363(f)(2). As such, the  
24 requirements of Section 363(f) have been met.

25 **C. Assumption And Assignment Under Section 365**

26 Section 365 of the Bankruptcy Code governs a debtor's ability to assume and assign executory  
27 contracts and unexpired leases. For the reasons set forth below, the relief sought in this Motion,  
28 seeking approval of the assumption, cure and assignment of the BPF License and the Related Rights,  
is warranted by the provisions of that statute.

1           **1. Business Judgment Rule**

2           A debtor’s ability to assume executory contracts and unexpired leases has been consistently  
3 characterized as one of the most important and basic tools available to a debtor seeking to reorganize  
4 under chapter 11. *See In re U.S. Wireless Data, Inc.*, 547 F.3d 484, 488 (2nd Cir. 2008) (contract  
5 assumption is an “important reorganizational tool”); *In re Bankvest Capital Corp.*, 360 F.3d 291, 296  
6 (1st Cir. 2004) (“one of the basic reorganization tools available). Section 365 permits a debtor “to go  
7 through the inventory of executory contracts of the debtor and decide which ones it would be  
8 beneficial to adhere to and which ones it would be beneficial to reject.” *In re Orion Pictures Corp.*, 4  
9 F.3d 1095, 1098 (2nd Cir. 1993).

10           It is well established that a debtor’s decision to assume and assign an executory contract or  
11 unexpired lease is governed by the “business judgment rule.” *See Richmond Leasing Co. v. Capital*  
12 *Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985). Under the business judgment rule, a court should  
13 approve a debtor’s proposed assumption and assignment if it will benefit the estate. *Id.* Furthermore,  
14 a debtor’s decision to assume and assign an executory contract should be accepted unless evidence is  
15 presented that the decision was “clearly erroneous, too speculative, or contrary to the provisions of  
16 the Bankruptcy Code.” *Id.*

17           Here, the assumption and assignment of the BPF License is an essential part of allowing the  
18 Debtor to effectuate a plan of reorganization, and is demonstrably more beneficial to the estate than  
19 any feasible alternative. As such, the assumption and assignment of the BPF License is well within  
20 the sound business judgment parameters discussed above.

21           **2. Assumability and Assignability of BPF License**

22           Section 365 of the Bankruptcy Code gives the debtor-in-possession the power to assume the  
23 debtor's leases, ongoing performance contracts, and licenses, subject to Bankruptcy Court approval,  
24 but not if “applicable law excuses a party, other than the debtor, to [an executory contract] from  
25 accepting performance from or rendering performance to an entity other than the debtor or the debtor  
26 in possession, whether or not such contract or lease prohibits or restricts assignment of rights or  
27 delegation of duties; and ... such party does not consent to such assumption or assignment ....” §§  
28 365(c)(1)(A)-(B).

1 The Ninth Circuit Court of Appeals has interpreted this language to mean that a debtor-in-  
2 possession may assume an executory contract only if, hypothetically, it might assign that contract to a  
3 third party. That is to say, if the debtor-in-possession lacks hypothetical authority to assign a  
4 contract, then it may not assume it, even if the debtor-in-possession has no actual intention of  
5 assigning the contract to another. *N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145, 129  
6 S. Ct. 1577, 173 L. Ed. 2d 1028 (2009) ; citing *In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9<sup>th</sup>  
7 Cir. 1999).

8 In the Ninth Circuit, in using the “hypothetical test,” a bankruptcy court must determine  
9 whether applicable nonbankruptcy law excuses the non-debtor party from accepting performance  
10 from, or rendering performance to, a hypothetical third party. When a license agreement involves use  
11 of a patent, “applicable law” means federal patent law. See *In re Catapult Entertainment, Inc.*, 165  
12 F.3d 747, 750 (9th Cir. 1999) (“[O]ur precedents make it clear that federal patent law constitutes  
13 ‘applicable law’ within the meaning of § 365(c)”); *In re Hernandez*, 285 B.R. 435, 438 (Bankr. Ariz.  
14 2002) (applying federal patent law in construing § 365(c)(1)).

15 Federal patent law generally prohibits assignment of both exclusive and non-exclusive license  
16 agreements absent consent of the licensor. Here, however, BPF has consented to the sale and  
17 assignment of the BPF License. In addition, absent such consent, the Debtor believes that the terms  
18 of the license would provide consent as part of the restructuring of the Debtor. In any event, given  
19 BPF’s express consent, the BPF License and the BPF Patents are assumable and assignable to Oxeia.

### 20 **3. Cure Payments**

21 Generally, a debtor can only assume executory contracts and unexpired leases if the debtor, at  
22 the time of assumption, it cures, or provides adequate assurance that it will promptly cure, any  
23 monetary defaults under the contracts to be assumed. 11 U.S.C. § 365(b)(1)(A). Here, however, the  
24 Debtor and BPF have agreed to release any and all claims related to the BPF License, eliminating the  
25 need for any cure payments by the Debtor.

### 26 **4. Adequate Assurance of Future Performance**

27 Section 365(f)(2) of the Bankruptcy Code requires a debtor to demonstrate adequate  
28 assurance of future performance by the assignee of the executory contract for a debtor to assume and



1 assign such contract. As set forth in the Shah Dec., Oxeia is able to perform the licensee's  
2 obligations under the BPF License, as amended in the proposed transaction.

3 **D. Good Faith Determination Under Section 363(m)**

4 In the event that the Court approves the proposed sale, the Debtor wishes to ensure the finality  
5 and reliability of the sale of the BPF License, by facilitating the consummation of the transaction  
6 even in the event of an appeal. To that end, the Debtor seeks a finding of good faith under the  
7 provisions of Section 363(m) of the Bankruptcy Code, which provides as follows:

8 The reversal or modification on appeal of an authorization under subsection (b) or (c)  
9 of this section of a sale or lease of property does not affect the validity of a sale or  
10 lease under such authorization to an entity that purchased or leased such property in  
11 good faith, whether or not such entity knew of the pendency of the appeal, unless such  
12 authorization and such sale or lease were stayed pending appeal. 11 U.S.C. § 363(m).

11 Though the Bankruptcy Code does not provide a definition of good faith, the Ninth Circuit Court of  
12 Appeals has defined a good faith purchaser as "one who buys 'in good faith' and 'for value.'" *In re*  
13 *Fearing*, 143 F. App'x 744, 746 (9th Cir. 2005); *citing In re Ewell*, 958 F.2d 276, 281 (9th Cir. 1992).

14 As set forth above and in the Fineman Dec. and the Shah Dec., the proposed terms of sale of  
15 the BPF License were negotiated at arms' length and in good faith, without collusion or fraud. The  
16 Debtor negotiated the terms with Oxeia in order to obtain a feasible and beneficial sale of the BPF  
17 License, and the Debtor has no information to suggest any lack of good faith on the part of Oxeia.  
18 The Debtor does not believe that any collusion has been involved in any of Oxeia's conduct in this  
19 matter, all of which conduct appears to the Debtor to have been fair and straightforward.

20 Under those circumstances, the Debtor submits that a finding of good faith, and a  
21 determination that Oxeia is a good faith purchaser, is appropriate in this case.

22 **E. Release Of Claims Under Assignment Agreement**

23 Rule 9019(a) of the Bankruptcy Rules provides, in relevant part, that "on motion by the  
24 trustee and after notice and a hearing, the court may approve a compromise or settlement." "The  
25 purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and  
26 burdens associated with litigating sharply contested and dubious claims." *Martin v. Kane (In re A&C*  
27 *Properties)*, 784 F.2d 1377, 1380-81 (9th Cir. 1986) *cert. denied sub nom. Martin v. Robinson*, 479  
28 U.S. 854, 107 S. Ct. 189 (1986). Accordingly, "[t]he law favors compromise and not litigation for its

1 own sake, and as long as the bankruptcy court amply considered the various factors that determined  
2 the reasonableness of the compromise, the court's decision must be affirmed." *In re A&C Properties*.  
3 784 F.2d at 1381.

4 Bankruptcy Rule 9019(a) also empowers bankruptcy courts to approve settlements "if they  
5 are in the best interests of the estate." *In re Drexel Burnham Lambert Grp., Inc.*, 134 B.R. 499, 505  
6 (Bankr. S.D.N.Y. 1991).

7 In *A&C Properties*, the Ninth Circuit Court of Appeals articulated four factors that a  
8 bankruptcy court must consider when evaluating a proposed settlement:

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10  
11 In determining the fairness, reasonableness and adequacy of a proposed settlement  
12 agreement, the court must consider: (a) The probability of success in the litigation; (b)  
13 the difficulties, if any, to be encountered in the matter of collection; (c) the complexity  
14 of the litigation involved, and the expense, inconvenience and delay necessarily  
attending it; (d) the paramount interest of the creditors and a proper deference to their  
reasonable views in the premises.

15 *A&C Properties*, 784 F.2d *supra* at 1381.

16 In applying the four-factor test, the court must determine whether the proposed settlement is  
17 fair and equitable and in the best interest of the estate. *In re A&C Properties*. 784 F.2d at 1381.

18 Here, the Debtor proposes to compromise its disputes with BPF under the BPF License,  
19 through a mutual, general release that will eliminate any claims of BPF against the Debtor under the  
20 license, and any claims of the Debtor against BPF under the preference provisions of Section 547(b)  
21 of the Bankruptcy Code. That compromise is strongly favored by the four-factor test described  
22 above. As to the first factor, the probability of success in the litigation: In the event that the Debtor  
23 pursued a preference action, preference litigation would not only create additional costs for the  
24 Debtor, but would upend the reciprocal settlement between the parties, foster litigation regarding any  
25 prepetition arrearages, and eliminate the Debtor's ability to assign the BPF License to Oxeia on a  
26 consensual basis.

27 As to the second factor, the difficulties, if any, to be encountered in the matter of collection:  
28 Collection might be problematic if no settlement occurred, inasmuch as BPF is based in Tokyo,

1 Japan, and collection might therefore be expensive and delayed. The third factor, the concessions  
2 required of the Debtor under the settlement of claims, weighs in favor of the compromise as well, as  
3 the potential preference recovery, \$51,078.60, especially once reduced by the costs of litigation and  
4 collection, would be far less than the purchase price to be paid by Oxeia under the transaction enabled  
5 by the compromise. Finally, the fourth factor – the best interests of creditors – clearly supports the  
6 compromise. A settlement between the Debtor and BPF enables the Debtor to complete the sale and  
7 assignment of the BPF License and the BPF Patents in a manner that facilitates the Debtor’s  
8 reorganization and produces net proceeds for the estate.

9 Accordingly, the Debtor respectfully submits that a settlement is warranted under the  
10 standards established by the Ninth Circuit Court of Appeals in *A&C Properties*. Therefore, the  
11 Debtor, having exercised its sound business judgment, requests approval of its proposed compromise  
12 with BPF pursuant to Bankruptcy Rule 9019(a).

#### 13 **VI. NOTICE**

14 The Debtor, through its counsel, has served this Motion, and notice of hearing, through the  
15 Court’s document filing system (ECF), electronic mail and/or U.S. mail to the Office of United States  
16 Trustee for the Northern District of California, MidCap and its counsel, counsel for the DIP Lender,  
17 all parties that have filed notices of appearances in this case, all creditors listed on the Debtor’s  
18 Schedules of Assets and Liabilities, including the twenty (20) largest unsecured creditors of the  
19 Debtor (as identified in the lists filed pursuant to Bankruptcy Rule 1007(d)), and all creditors that  
20 have filed proofs of claims in this case.

#### 21 **VII. CONCLUSION**

22 WHEREFORE, the Debtor respectfully submits that the best interests of creditors and all  
23 parties-in-interest will be served by allowing the Debtor to sell, assume and assign the BPF License  
24 and the Related Rights to Oxeia, on the terms set forth above and in the Assignment Agreement.  
25 Accordingly, the Debtor requests entry of an order granting this Motion and providing the following  
26 relief:

27 A. Authorizing the transfer, by sale and assignment, of the BPF License and the Related  
28 Rights, to Oxeia pursuant to the Assignment Agreement, free and clear of the liens of the DIP

1 Lender, with such liens attaching to the net proceeds of sale to the same extent of priority, validity  
2 and enforceability as presently exists against the BPF License, under Sections 105(a) and 363(b),  
3 (f)(2) and (m), and 365(f) of the Bankruptcy Code, and Bankruptcy Rule 6006;

4 B. Approving the assumption and assignment of the BPF License and the Related Rights  
5 to Oxeia pursuant to the Assignment Agreement, under Sections 105(a) and 365(a), (b) and (f) of the  
6 Bankruptcy Code, and Bankruptcy Rule 6006;

7 C. Finding that the Debtor, Oxeia and BPF have acted in good faith in connection with  
8 the proposed sale, pursuant to Section 363(m) of the Bankruptcy Code;

9 D. Approving the compromise and release of claims between the Debtor and BPF as set  
10 forth in the Assignment Agreement, pursuant to Bankruptcy Rule 9019(a); and

11 E. Granting such other and further relief as this Court deems proper.

12 DATED: May 11, 2017

MEYERS LAW GROUP, P.C.

14 By: /s/ Merle C. Meyers  
15 Merle C. Meyers, Esq.  
16 Attorneys for KineMed, Inc., Debtor

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# EXHIBIT A

**ASSUMPTION AND ASSIGNMENT AGREEMENT**  
**(SUN 11031)**

This Assumption And Assignment Agreement (SUN 11031) (this “Agreement”) is entered into as of May 1, 2017 by (a) KINEMED, INC., a corporation incorporated under the laws of the State of Delaware (“KineMed”); (b) OXEIA BIOPHARMACEUTICALS, INC., a Delaware corporation (“Oxeia”); and (c) BIOPHARMA FOREST, INC., a stock company formed under the Companies Act of Japan (“BPF”). Each of KineMed, Oxeia and BPF are also hereinafter referred to individually as a “Party” and collectively as the “Parties.” The Parties agree as follows:

**RECITALS**

A. KineMed is the debtor in a voluntary bankruptcy case under chapter 11 of the United States Bankruptcy Code filed in the United States Bankruptcy Court for the Northern District of California, Oakland Division (the “Bankruptcy Court”), Case No. 16-41241 (the “Chapter 11 Case”). The Chapter 11 Case was commenced on May 4, 2016 (the “Petition Date”), when KineMed filed its voluntary bankruptcy petition. KineMed remains in possession of its bankruptcy estate, no trustee having been appointed under Section 1104 of the Bankruptcy Code.

B. The respective Boards of Directors of KineMed, Oxeia and BPF believe it is in the best interests of their respective companies and the shareholders of their respective companies that the Parties undertake the various assignments and assumptions and other actions contemplated by this Agreement.

C. KineMed is currently (i) the licensee, and BPF is the licensor, under that certain BPF KineMed License Agreement SUN 11031 dated as of February 2016 (the “License Agreement”), pursuant to which BPF has licensed to KineMed certain patents and other intellectual property and assets related to SUN 11031, and (ii) the assignee and sole owner of all rights, title and interest in the related SUN 11031 data, reports, and regulatory documents in its possession or control and U.S. Food and Drug Administration (the “FDA”) filings (collectively, the “SUN 11031 Regulatory Material”) by Asubio Pharma Co., Ltd., and subsequently acquired by and transferred to KineMed.

D. BPF contends that KineMed is in default of its obligations under the License Agreement, and that KineMed owes BPF claims based on such defaults. KineMed contends that BPF is liable to KineMed for certain payments made by KineMed to BPF shortly before the Petition Date, pursuant to Section 547(b) of the Bankruptcy Code.

E. KineMed wishes (i) to assume the License Agreement, the SUN 11031 Regulatory Material and related rights to the SUN 11031 Supply (defined below); (ii) to assign all of its right, title and interest in and to the License Agreement and the SUN 11031 Supply to Oxeia; and (iii) to transfer and assign all of its right, title and interest in and to the SUN 11031 Regulatory Material to BPF, in each case, upon the terms set forth herein, pursuant to the provisions of Section 365 of the Bankruptcy Code, with the concurrent issuance by BPF of a customary letter of reference granting Oxeia full reference rights to the SUN 11031 Regulatory

Material (the “SUN 11031 Letter of Reference”). Oxeia wishes to take assignment of all of such right, title and interest in and to the License Agreement, and BPF wishes to take transfer and assignment of all of such right, title and interest in and to the SUN 11031 Regulatory Material, in each case, upon the terms set forth herein, pursuant to the provisions of Section 365 of the Bankruptcy Code. BPF is also willing to consent to such assumption and assignment of the License Agreement upon the terms set forth herein.

F. The Parties now wish to enter into this Agreement in order to accomplish such assumption and assignment, and to resolve all claims and disputes between KineMed and BPF, in accordance with the following terms and conditions.

### AGREEMENT

NOW, THEREFORE, THE PARTIES HEREBY AGREE, COVENANT AND STIPULATE, FOR ADEQUATE CONSIDERATION HEREBY RECEIVED AND ACKNOWLEDGED, as follows:

1. Recitals Incorporated. Each of the facts set forth in the foregoing recitals is known to the Parties to be true and correct, and each such recital is incorporated herein.

2. Condition to Effectiveness. The effectiveness of this Agreement is conditioned upon entry of an order (the “Assignment Order”) of the Bankruptcy Court approving this Agreement, pursuant to the provisions of Sections 107(b)(1), 363 and 365 of the Bankruptcy Code. This Agreement shall become effective on the first weekday that is at least fifteen (15) days after the date of entry of the Assignment Order, or such other date as all of the Parties may approve in writing (the “Effective Date”). For the avoidance of doubt, the KineMed’s motion to approve this Agreement pursuant to the foregoing will seek relief under Sections 107(b)(1), 363 and 365 of the Bankruptcy Code. On the Effective Date, (i) BPF shall deliver to Oxeia a duly authorized and executed SUN 11031 Letter of Reference, in mutually agreed upon form, and (ii) the Parties shall take such further action as is necessary to properly record with the FDA the SUN 11031 Regulatory Material assignment and transfer from KineMed to BPF and, if necessary, Oxeia’s rights of reference in respect thereof, together with BPF’s designation of a duly authorized U.S. agent for all FDA-related communications.

3. Assumption and Assignment. As of the Effective Date, conditioned upon concurrent and timely receipt by KineMed of the Purchase Price as and to the extent required by the provisions of Section 4 herein, (i) all of KineMed’s right, title and interest in and to the License Agreement, and the right to purchase the SUN 11031 Supply, shall be deemed assumed by KineMed and assigned to Oxeia, free and clear of all liens, claims, and encumbrances, and BPF shall be deemed to have consented to such assumption and assignment, such that as of the Effective Date, Oxeia shall be deemed to be the “Licensee” thereunder as if originally a party thereto in such capacity; and (ii) all of KineMed’s right, title and interest in and to the SUN 11031 Regulatory Material and any and all of KineMed’s intellectual property rights related thereto shall be transferred, assumed and assigned to BPF, free and clear of all liens, claims, and encumbrances, and Oxeia shall be deemed to have consented to such transfer, assumption and assignment. Upon such transfer, assumption and assignment, (a) any and all defaults under such agreements and/or instruments of any of the Parties existing prior thereto shall be deemed cured

or waived, (b) no cure amount or default damages or liability shall be due or owing, and (c) any and all obligations and rights, title and interests of KineMed arising under, or related in any manner to, the License Agreement and the SUN 11031 Regulatory Material (including without limitation all such rights in respect of SUN 11031 intellectual property granted thereunder) shall be deemed waived, discharged and released.

4. Purchase Price. In connection with the transactions contemplated under this Agreement, an aggregate of \$475,000.00 (the "Purchase Price") shall be payable by Oxeia to KineMed, which aggregate amount shall more specifically be payable in the separate amounts of \$350,000.00 and \$125,000.00 as follows, as applicable: (i) on the Effective Date, Oxeia shall pay to KineMed the sum of \$350,000.00 as a License Agreement assignment fee (the "License Assignment Fee"); and (ii) if (and only if), at any time prior to, on or after the Effective Date, Oxeia purchases from BPF or from any manufacturer or other entity identified in, or related to, the BPF License, any SUN 11031 clinical drug supply (as finished drug product and/or bulk API) (collectively, the "SUN 11031 Supply"), then on the SUN 11031 Supply delivery date, Oxeia shall pay to KineMed the additional sum of \$125,000.00 as a SUN 11031 Supply purchase fee (the "Supply Purchase Fee"). Each of the License Assignment Fee and the Supply Purchase Fee shall be paid by wire transfer pursuant to instructions provided by KineMed in advance in immediately available funds. Until and unless the Supply Purchase Fee has been paid to KineMed, Oxeia shall provide reports, no less frequently than the end of each calendar quarter after the Effective Date, of the status of its intent and timing with respect to purchase of the SUN 11031 Supply, which status reports KineMed shall use for its own internal reference purposes and under no circumstance disclose, in whole or in part, to any third party without Oxeia's prior written consent, provided that KineMed may (a) disclose in summary form the content of such status reports in any disclosure statement that it files in its chapter 11 case, with Oxeia's prior approval (which approval shall not be unreasonably withheld); and (b) disclose such status reports in any civil action brought to enforce or interpret rights and obligations under this Agreement, upon ten (10) days' prior written notice to Oxeia.

5. Amendment of License Agreement. As of the Effective Date, BPF and Oxeia shall enter into a mutually agreed amendment of the License Agreement, the terms and conditions of which have been established as of the date hereof.

6. General, Mutual Release. As of the Effective Date, KineMed, Oxeia and BPF (each, a "releasor" for purposes of Sections 6 and 7 hereof) shall, and do hereby, each waive and release any and all claims, rights and defenses, causes of action and offsets of any nature whatsoever (known or unknown) which they now have (or might have) against one another or against any of their respective estates, trustees, directors, officers, faculty, staff, employees, advisors, consultants, agents, attorneys or representatives, including, but not limited to, any claims that might be asserted or held by each as a releasor under the terms of the License Agreement or other contract. Without limiting the generality of the foregoing, pursuant to this release, the releasors shall release all claims based on defaults or avoidable transfers under the terms of the License Agreement or pursuant to applicable statute. Notwithstanding the foregoing, this mutual release shall not affect rights expressly created or preserved by the terms of this Agreement.



7. Unknown Claims. Each of the releasors expressly waives all rights that it has or may have under Section 1542 of the Civil Code of California and similar laws of any state or territory of the United States or other jurisdictions. Section 1542 of the Civil Code of California provides as follows:

Section 1542. General Release - Claims Extinguished. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

8. Expenses. In the event that, after a default by one of the Parties in performing its respective obligations hereunder, any motion, contested matter, complaint, answer, counterclaim, cross-claim or other action, in or out of court, is taken by any other Party hereto in order to enforce, interpret, implement or prosecute any of the terms of this Agreement, the prevailing Party shall be entitled to recover from the non-prevailing Party all of its reasonable costs incurred in doing so, including reasonable attorneys' fees and expenses.

9. Construction. This Agreement shall not be construed more strictly against one of the Parties merely by virtue of the fact that the majority of the document has been prepared by that Party or its counsel, it being recognized that each of the Parties has contributed substantially and materially to the preparation of this Agreement.

10. Consideration. Each of the Parties acknowledges and waives any claim contesting the existence and the adequacy of the consideration given by any of the other Parties hereto in entering into this Agreement.

11. Representations of the Parties. Each Party, on its own behalf, hereby represents and warrants to the other Parties that the following representations and warranties by such Party are true and correct in all respects as of the date hereof and the Effective Date:

(a) Such Party has all requisite corporate power and authority to execute and deliver this Agreement and the other documents and instruments to be executed and delivered by such Party pursuant hereto and to carry out the transactions contemplated hereby and thereby; provided that the foregoing representations on behalf of KineMed as of the date hereof (and not the Effective Date) shall be subject to the entry of the Assignment Order.

(b) The execution and delivery of this Agreement and the other documents and instruments to be executed and delivered by such Party pursuant hereto and the consummation of the transactions contemplated hereby and thereby have been duly authorized by such Party's applicable Board of Directors or comparable governing body, and if required under applicable law, by such Party's shareholders. No other or further act or proceeding on the part of such Party, or its shareholders, as applicable, is necessary to authorize this Agreement or the other documents and instruments to be executed and delivered by such Party, and if required under applicable law, by such Party's shareholders, pursuant hereto or the consummation of the transactions contemplated hereby and thereby; provided that this representation and warranty as of the date hereof

(and not the Effective Date) shall be subject to the entry of the Assignment Order. This Agreement constitutes, and when executed and delivered, the other documents and instruments to be executed and delivered by such Party pursuant hereto will constitute, valid and binding agreements of such Party, enforceable in accordance with their respective terms.

(c) Subject to the entry of the Assignment Order, neither the execution and delivery of this Agreement or the other documents and instruments to be executed and delivered by such Party pursuant hereto nor the consummation by the such Party of the transactions contemplated hereby and thereby will violate any applicable statute, law (including common law), ordinance, rule or regulation or any order, writ, injunction, judgment, plan or decree of any government, court, arbitrator, department, commission, board, bureau, agency, authority, instrumentality or other body, whether federal, state, municipal, county, local, foreign, supranational or other.

12. KineMed Representation. In addition to its representations and warranties under Section 11, KineMed represents and warrants to Oxeia and BPF that as of the date hereof and Effective Date, (i) KineMed has not sold, assigned, transferred, licensed or otherwise disposed of any of its right, title, or interest in and to the License Agreement or the SUN 11031 Regulatory Material or in each case any and all of KineMed's intellectual property rights related thereto, or the SUN 11031 Supply, and (ii) except as described on Exhibit A hereto, there are no liens or encumbrances on, or any shared interest in, the License Agreement or the SUN 11031 Regulatory Material or in each case any and all of KineMed's intellectual property rights related thereto, or the SUN 11031 Supply. For clarity, it is agreed and understood by the Parties that the liens identified on Exhibit A hereto shall not, as of and following the Effective Date, encumber in any manner any of the transferred or assigned interests covered by the Assignment Order.

13. Entire Agreement. The Parties each acknowledge that there are no other agreements or representations, either oral or written, express or implied, not embodied in this Agreement, which represents a complete integration of all prior and contemporaneous agreements and understandings of the Parties, provided that nothing herein shall limit or affect the rights and obligations of any of the Parties under non-disclosure or non-circumvention agreements entered into by one or more of the Parties heretofore.

14. Further Assurances; No Further Changes. Each Party shall perform all further acts and execute and deliver such further documents as may be necessary or as any other Party may reasonably require to implement or give effect to this Agreement and the transactions contemplated hereunder.

15. Benefit. Except as provided herein, this Agreement shall be binding upon and, shall inure to the benefit of the Parties, and their respective successors, estates, assigns, grantees, heirs, executors, personal representatives, and administrators.

16. Counterparts. It is understood and agreed that this Agreement may be executed in several counterparts and may be transmitted by electronic mail or by original signature, each of which shall, for all purposes, be deemed an original and all of such counterparts, taken together,

shall constitute one and the same Agreement, even though all of the Parties hereto may not have executed the same counterpart of this Agreement.

17. No Assignment. Each of the Parties represents and warrants to the other that the claims set forth herein have not been assigned to third parties, and that the releases of those claims, as set forth above, shall be fully effective and comprehensive according to their terms. No rights under this Agreement may be assigned without the written consent of the other Parties, other than any assignment, transfer or other disposition of rights or assets of KineMed that derive from this Agreement occurring by operation of the Bankruptcy Code or related to, arising under or contained in a plan of reorganization or liquidation confirmed in KineMed's chapter 11 case.


18. Counsel. Each of the Parties acknowledges that it has had the opportunity to consult with counsel of its own choice concerning the matters covered hereby and has received such counsel and information as it deems necessary for it to make a reasoned and thoughtful decision to execute this Agreement.

19. Jurisdiction. The Bankruptcy Court shall have exclusive jurisdiction to hear and resolve any disputes as to the enforcement, interpretation or implementation of this Agreement.

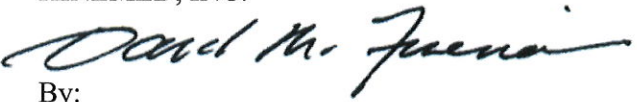
20. Time is of Essence. Time is of the essence in this Agreement, and any timeliness stated herein may be strictly enforced.

WHEREFORE, the Parties have executed this Agreement upon the terms and conditions set forth above.

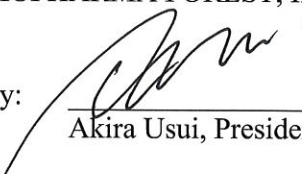
OXEIA BIOPHARMACEUTICALS, INC.

By:   
Kartik Shah, President

KINEMED, INC.

By:   
David M. Fineman, Chief Executive Officer

BIOPHARMA FOREST, INC.

By:   
Akira Usui, President

**EXHIBIT A**

**Liens**

1. Liens held by Midcap Financial Trust, as successor agent to MidCap Funding V, LLC
2. Liens held by KineMed DIP Lenders, LLC