

Citation: 2024 BCSECCOM 182

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*, ss. 3.1, 3.2 and 5.1 – National Instrument 51-102 *Continuous Disclosure Obligations*, s. 13.1 – s. 1.1, definition of “MD&A” - An issuer that is not yet an ‘SEC issuer’ wants to file financial statements prepared in accordance with U.S. GAAP and audited in accordance with U.S. GAAS - the issuer intends to become an SEC registrant - the issuer has filed a registration statement with the SEC; the issuer will meet all the elements of the definition of ‘SEC issuer’ once the SEC accepts its registration statement; the issuer will file financial statements and MD&A that comply with the requirements for SEC issuers in NI 52-107 and NI 51-102; if the issuer does not become an SEC issuer by a set date, it will re-file its financial statements in accordance with Canadian GAAP and Canadian GAAS and its MD&A in the Canadian form

Applicable Legislative Provisions

National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*, s. 3.2, 3.3

National Instrument 51-102 *Continuous Disclosure Obligations*, s. 1.1

April 29, 2024

In the Matter of
the Securities Legislation of
British Columbia
(the Jurisdiction)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
Yerbaé Brands Corp.
(the Filer)

Decision

Background

¶ 1 The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) for an exemption from

- (a) the requirements in sections 3.2 and 3.3 of National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* (NI 52-107) that financial statements, other than acquisition statements, be prepared in accordance with Canadian GAAP applicable to publicly accountable enterprises and, if applicable, audited in accordance with Canadian GAAS, and

- (b) the requirement in the definition of MD&A in section 1.1 of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) that management's discussion and analysis be prepared in accordance with the form of Form 51-102F1 *Management's Discussion & Analysis* (Canadian MD&A Form), with respect to the financial statements for the year ended December 31, 2023 and the interim period ended March 31, 2024, and any subsequent periods, and the management's discussion and analysis prepared for these periods

(collectively, the Exemptions Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application)

- (a) the British Columbia Securities Commission is the principal regulator for this application, and
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta.

Interpretation

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions*, NI 52-107, NI 51-102 and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

- ¶ 3 This decision is based on the following facts represented by the Filer:
1. the Filer is a company incorporated under the *Business Corporations Act* (British Columbia) on February 8, 2023, as a result of an amalgamation between 1362283 B.C. LTD. and Kona Bay Technologies Inc.;
 2. the Filer's head office is located in Scottsdale, Arizona, United States;
 3. the Filer's registered office is located in British Columbia;
 4. the primary business of the Filer is the production, marketing and distribution of naturally caffeinated, zero calorie, plant-based energy beverages;
 5. the Filer is a reporting issuer in British Columbia and Alberta and is not in default of securities legislation in any jurisdiction;
 6. the common shares of the Filer are listed on the TSXV under the symbol "YERB.U" and on the OTCQX under the symbol "YERBF";
 7. the Filer's financial year end is December 31;
 8. the majority of the executive officers and directors of the Filer are resident in the United States;
 9. the vast majority of the consolidated assets of the Filer are located in the United States;

10. the business of the Filer is administered principally in the United States;
11. the majority of the Filer's outstanding voting securities are directly or beneficially held by residents of the United States;
12. immediately following the amalgamation on February 8, 2023, the Filer determined that it did not meet the definition of "foreign private issuer" in the United States, as defined in Rule 405 of Regulation C under the 1933 Act and Rule 3b-4 of the 1934 Act; as a result, effective January 1, 2024, the Filer is no longer exempt from certain provisions of U.S. securities laws applicable to U.S. domestic companies;
13. on April 23, 2024 the Filer filed a registration statement on Form 10 (the Form 10) with the SEC in order to register its common shares under the 1934 Act to conduct an initial public offering of its common shares in the United States and list its common shares on The Nasdaq Capital Market; as the Filer is not a "foreign private issuer", it is required to include in its registration statement financial statements prepared in accordance with U.S. GAAP and audited in accordance with U.S. PCAOB GAAS;
14. upon the effectiveness of the registration statement on Form 10, the Filer will become subject to the periodic reporting requirements to file reports with the SEC under the 1934 Act; the Filer anticipates that it will become an SEC Issuer as defined in NI 52-107 within 60 days of the date of filing the Form 10;
15. the Filer has prepared audited financial statements for the fiscal years ended December 31, 2023 and December 31, 2022, in accordance with U.S. GAAP (the Financial Statements); the audit for the fiscal years ended December 31, 2023 and December 31, 2022 was conducted in accordance with U.S. PCAOB GAAS;
16. subject to receipt of relief for the Exemptions Sought, the Filer intends to file the Financial Statements on SEDAR+;
17. upon becoming an SEC Issuer, the Filer may (i) under Part 3.7 of NI 52-107, prepare its financial statements, other than acquisitions statements, in accordance with U.S. GAAP, (ii) under Part 1.1 of NI 51-102, prepare its management's discussion and analysis in accordance with Item 303 of Regulation S-K under the 1934 Act, and (iii) under Part 3.8 of NI 52-107, have its annual financial statements audited in accordance with U.S. PCAOB GAAS;
18. the Exemptions Sought eliminate the need to also prepare financial statements for the fiscal year ended December 31, 2023 and the interim period ended March 31, 2024 in accordance with Canadian GAAP applicable to publicly accountable enterprises;
19. the Filer will comply with the requirement of subsection 4.3(4) of NI 51-102 by filing the restated interim financial statements for each of the interim periods in fiscal 2023 in accordance with U.S. GAAP at the same time it files the Financial Statements on SEDAR+, which will be on or prior to April 29, 2024; and
20. if the Filer does not become an SEC Issuer by August 29, 2024, the Filer will immediately re-file on SEDAR+ all previously filed financial statements prepared in accordance with U.S. GAAP and related management's discussion and analysis; the re-filed financial statements will be prepared in accordance with Canadian GAAP applicable to publicly accountable

enterprises and audited in accordance with Canadian GAAS, as applicable; the management's discussion and analysis will be amended to reflect the refiled financial statements and will be re-filed in the Canadian MD&A Form; and the Filer will issue a news release upon re-filing the financial statements that explains the nature and purpose of the re-filings.

Decision

- ¶ 4 The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemptions Sought are granted provided that:

- (a) the Filer files:
 - (i) financial statements prepared in accordance with U.S. GAAP for the year ended December 31, 2023 and the interim period ending March 31, 2024 and any subsequent interim period, and, if applicable, audited in accordance with U.S. PCAOB GAAS;
 - (ii) the related management's discussion and analysis prepared in accordance with Item 303 of Regulation S-K under the 1934 Act for these periods; and
- (b) if the Filer does not become an SEC Issuer by August 29, 2024, the Filer will immediately file on SEDAR:
 - (i) the financial statements for the year ended December 31, 2023 and each of the interim periods in fiscal 2024, prepared in Canadian GAAP applicable to publicly accountable enterprises and audited in accordance with Canadian GAAS, as applicable;
 - (ii) the related management's discussion and analysis in the Canadian MD&A Form; and
 - (iii) a news release explaining the nature and purpose of the re-filings.

John Hinze
Director, Corporate Finance
British Columbia Securities Commission