SUMMARY
April 18, 2024

2024COA39

No. 22CA0946, *Brightstar, LLC v. Jordan* — Civil Procedure — Service and Filing of Pleadings and Other Papers — Service by Email; ADR — Arbitration

A division of the court of appeals decides, as an issue of first impression concerning the interpretation of C.R.C.P. 5, that service of a pleading or other paper by email to a party's attorney is effective if the attorney has included an email address in previous court filings.

The division also considers various other issues raised by the parties in this appeal from a district court judgment vacating a $100 million arbitration award. Specifically, the division concludes that the Federal Arbitration Act (rather than the Colorado Revised Uniform Arbitration Act) applies to the parties' proceedings to confirm or vacate the arbitration award; the parties who sought

vacatur of the arbitration award timely served their motions to vacate; the arbitration award was not subject to vacatur based on arbitrator bias, misconduct, failure to provide a fair hearing, or excess of powers; the arbitrator lacked jurisdiction over the individual member of one of the involved entities; and the arbitrator properly exercised jurisdiction over a side agreement of the parties. Accordingly, the division affirms the district court's judgment in part and reverses it in part and remands the case with directions.

COLORADO COURT OF APPEALS **2024COA39**

Court of Appeals No. 22CA0946
City and County of Denver District Court Nos. 20CV33204 & 21CV33546
Honorable J. Eric Elliff, Judge

Brightstar LLC,

Petitioner-Appellee and Cross-Appellant,

v.

Rhett Jordan and Josh Ginsberg,

Respondents-Appellants and Cross-Appellees,

v.

Peter Knobel,

Intervenor-Appellee and Cross-Appellant.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE GOMEZ
J. Jones and Harris, JJ., concur

Announced April 18, 2024

Haddon, Morgan and Foreman, P.C., Ty Gee, Adam Mueller, Denver, Colorado, for Petitioner-Appellee and Cross-Appellant

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Venable LLP, Elizabeth M. Manno, Washington DC; Amit Rana, San Francisco, California, for Respondent-Appellant and Cross-Appellee, Josh Ginsberg

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¶ 1 This case presents numerous issues arising out of disputes between the three members of an amalgamation of limited liability companies (LLCs) operating in the cannabis industry under the name Native Roots.

¶ 2 Based on an arbitration clause in Native Roots' operating agreement, the members arbitrated their disputes, resulting in a $100 million award and a permanent injunction in favor of two of the members (Josh Ginsberg and Rhett Jordan) and against the third member (Brightstar LLC) and its sole member (Peter Knobel). Ginsberg and Jordan filed motions in the district court to confirm the arbitration award, and Brightstar and Knobel filed motions to vacate it. In an omnibus order, the court denied the motions to confirm and granted the motions to vacate, concluding, among other things, that Brightstar's and Knobel's motions to vacate were timely, the arbitrator was biased against Brightstar and Knobel, and Knobel wasn't subject to arbitral jurisdiction. Both sides have appealed different aspects of the omnibus order to this court.

¶ 3 Addressing an issue of first impression concerning the interpretation of C.R.C.P. 5, we conclude that service of a pleading or other paper by email to a party's attorney is effective if the

attorney has included an email address in previous court filings. Accordingly, we conclude that Brightstar's and Knobel's motions to vacate were timely. Based on that conclusion and our disposition of the other issues raised on appeal, we affirm the judgment in part and reverse it in part and remand the case with directions.

I. Background

¶ 4 As of 2017, when the parties' disputes arose, Brightstar held a seventy percent interest in Native Roots, and Ginsberg and Jordan had, respectively, a sixteen and a fourteen percent interest.

¶ 5 Over the next three and a half years, the three members, along with Native Roots and Knobel (who, as the sole member of Brightstar, had lost his attempts to stay out of the arbitration), arbitrated their disputes pursuant to the arbitration clause in Native Roots' operating agreement. That clause provided, in relevant part, as follows:

> Unless otherwise agreed in writing, any controversy, claim or dispute arising out of or relating to this Agreement, shall be settled by binding arbitration in Denver, Colorado. Such arbitration shall be conducted in accordance with the then prevailing commercial arbitration rules of the American Arbitration Association ("AAA") . . . . The parties agree to abide by all decisions and awards rendered in such

> proceedings. Such decisions and awards rendered by the Arbitrator shall be final and conclusive and may be entered in any court having jurisdiction thereof as a basis of judgment and of the issuance of execution for its collection. All such controversies, claims or disputes shall be settled in this manner in lieu of any action at law or equity . . . . The Arbitrator shall not have the right to award punitive damages or speculative damages to either party and shall not have the power to amend this Agreement.

¶ 6 After extensive prehearing proceedings and a fifteen-day evidentiary hearing, the arbitrator entered an award on the merits, followed by an award on attorney fees and costs. As part of the merits award, the arbitrator ruled in favor of Ginsberg and Jordan and against Brightstar and Knobel on a claim for breach of the operating agreement's right of first offer provision. Under that provision, if one member proposed to initiate a sale of any part of his or its membership interest to a third party, the selling member was required to first deliver a written notice to the other members with a binding offer to sell the membership interest to them at the same price. The arbitrator found that Brightstar had breached this provision by executing a "secret" letter of intent proposing to initiate a sale to a third party without disclosing the proposal or making a

binding offer to sell the interest to Ginsberg and Jordan at the same price. For this breach, the arbitrator awarded damages of about $53 million to Ginsberg and $47 million to Jordan based on the approximately $20 million purchase price, the $120 million value of Brightstar's membership interest at the time, and the ratio of Ginsberg's and Jordan's respective membership interests.[1] Having found that Knobel was Brightstar's alter ego, the arbitrator awarded these amounts against Brightstar and Knobel, jointly and severally. It is this arbitration award that the district court vacated and declined to confirm.

¶ 7 In their appeals, Ginsberg and Jordan contend that the district court erred by applying the Federal Arbitration Act (FAA) to the motions to confirm and to vacate, by vacating the award based on the arbitrator's evident partiality, and by ruling that Knobel wasn't subject to arbitral jurisdiction. Ginsberg also contends that the court erred by ruling that Brightstar's and Knobel's motions to

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[1] The reason the proposed price in the letter of intent was so much lower than the actual value of Brightstar's membership interest is complicated and relates to the parties' ongoing disputes under other provisions of the operating agreement. But Brightstar took the position early on — even with the other party to the letter of intent — that the letter of intent and its price term weren't binding.

vacate were timely served on him. In its response to Ginsberg's and Jordan's appeals and in its cross-appeal, Brightstar contends that several alternative grounds support vacatur of the award. And in its cross-appeal, Brightstar also contends that the arbitrator lacked jurisdiction over a related loan dispute. We examine each of these contentions, beginning with the applicability of the FAA.

II. Applicability of the FAA

¶ 8 Ginsberg and Jordan contend that the district court erred by applying the FAA, rather than the Colorado Revised Uniform Arbitration Act (CRUAA), to the motions to confirm and to vacate the arbitration award.[2] We aren't persuaded.

A. Standard of Review and Applicable Legal Standards

¶ 9 We review de novo a district court's legal conclusions on a motion to confirm or vacate an arbitration award. *Price v. Mountain Sleep Diagnostics, Inc.*, 2020 COA 155, ¶ 6. Likewise, we review de novo a district court's rulings on issues involving contract interpretation, *see Heights Healthcare Co. v. BCER Eng'g, Inc.*, 2023

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[2] In this case, the determination of whether the FAA or the CRUAA applies affects the timelines for filing and serving the motions to vacate, the potential bases for vacating the arbitration award, and the availability of attorney fees for this appeal.

COA 44, ¶ 39, and choice of law, *see BlueMountain Credit Alts. Master Fund L.P. v. Regal Ent. Grp.*, 2020 COA 67, ¶ 9. Accordingly, we review this issue de novo.

¶ 10 The FAA favors enforcement of any written arbitration clause in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Courts presume that an arbitration clause within any such contract falls within the scope of the FAA. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003); *Fonden v. U.S. Home Corp.*, 85 P.3d 600, 602 (Colo. App. 2003). In doing so, courts interpret the phrase "evidencing a transaction involving commerce" to extend to the full reach of Congress's authority under the Commerce Clause. *See Citizens Bank*, 539 U.S. at 56; *Grohn v. Sisters of Charity Health Servs. Colo.*, 960 P.2d 722, 725 (Colo. App. 1998); *see also* 9 U.S.C. § 1; U.S. Const. art. I, § 8, cl. 3.

¶ 11 However, parties may agree in a contract to apply other rules, such as state arbitration laws, rather than the FAA. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *1745 Wazee LLC v. Castle Builders Inc.*, 89 P.3d 422, 424 (Colo. App. 2003). But to do so, their contract must clearly evidence their intent for those other rules to apply. *See, e.g.*,

Johnson v. Gruma Corp., 614 F.3d 1062, 1066 (9th Cir. 2010); *Oberwager v. McKechnie Ltd.*, 351 F. App'x 708, 711 (3d Cir. 2009).

B. Application

¶ 12 We agree with the district court's conclusion that the FAA governs the issues raised in the motions to confirm and to vacate the arbitration award. Ginsberg and Jordan don't challenge the operating agreement's nexus to interstate commerce. Instead, they argue only that the parties clearly evidenced an intent to apply the CRUAA rather than the FAA through (1) the operating agreement's choice of law provision and (2) their conduct in the arbitration proceedings. We address each argument in turn.

1. The Operating Agreement

¶ 13 Ginsberg and Jordan first point to the language of the operating agreement, which includes both an arbitration clause and a choice of law provision.

¶ 14 The arbitration clause, more fully quoted above, states that any arbitration "shall be conducted in accordance with the then prevailing commercial arbitration rules of the [AAA]." But it doesn't specify what body of arbitral law applies.

¶ 15 The choice of law provision states,

> It is the intention of the parties that the internal laws of the State of Colorado and in particular the provisions of the [Colorado Limited Liability Company] Act shall govern the validity of this Agreement, the construction of its terms and interpretation of the rights and duties of the parties.

¶ 16 In a similar situation involving an agreement with both an arbitration clause and a choice of law provision, the United States Supreme Court held that "the choice-of-law provision cover[ed] the rights and duties of the parties, while the arbitration clause cover[ed] arbitration; neither sentence intrude[d] upon the other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995). A division of this court did the same in *1745 Wazee*, holding that the choice of law provision related only to state substantive law — not state arbitral law. 89 P.3d at 425.

¶ 17 In this case, as in *1745 Wazee*, neither the agreement's arbitration provision nor its choice of law provision specifies whether the FAA or state arbitral law applies. *See id.* Like the division in *1745 Wazee*, we hold that under these circumstances, the FAA applies, as there is no clear evidence of an intent to apply the CRUAA. *See also Johnson*, 614 F.3d at 1066 ("[A] general choice-of-law clause within an arbitration provision does not trump

the presumption that the FAA supplies the rules for arbitration." (quoting *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002))) (alteration in original); *Oberwager*, 351 F. App'x at 711 ("[A] generic choice-of-law provision is insufficient to evidence the clear intent necessary to opt out of the FAA's default regime.").

2. The Parties' Conduct

¶ 18 Ginsberg and Jordan also point to the parties' conduct — specifically, two events — during the arbitration proceedings, which, they say, indicates the parties' clear intent for the CRUAA to apply instead of the FAA.

¶ 19 First, they point to the parties' agreement to a scheduling order governing the arbitration proceedings. The agreed-upon order provided, in language requested by Brightstar, "The [CRUAA] will apply in the Arbitration. The Arbitrator will apply substantive law and procedural rules in accordance with Colorado law governing arbitration and the Rules."

¶ 20 Second, they point to an unsuccessful motion Brightstar filed to vacate an interim arbitration order, in which Brightstar cited the CRUAA provision for vacating an arbitration award. Brightstar later described that reference to the CRUAA as "wrong."

¶ 21 Ginsberg and Jordan argue that these two actions reflect the parties' intent that the entirety of the arbitration proceedings — including judicial review of the arbitration award — be governed by the CRUAA. They also point again to the broad language in the arbitration clause, which references a court's ability to enter judgment based on the arbitrator's award, and they suggest that the parties' conduct reflects on the entire process covered by the arbitration clause.

¶ 22 We must "err on the side of concluding that parties do not intend to opt out of the FAA scheme." *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Acct.*, 618 F.3d 277, 294 (3d Cir. 2010). Even assuming that the parties' later actions may reflect on their intent in the agreement to arbitrate, we conclude that the cited actions don't evidence the clear intent needed to override the FAA. As we've explained, the operating agreement itself doesn't indicate a clear intent to apply the CRUAA. Also, the fact that the parties agreed to use the CRUAA in proceedings before the arbitrator doesn't necessarily indicate an intent to use the CRUAA in later court proceedings to enforce or vacate an arbitration award. As one federal circuit court put it, "there is a difference between the

conduct of an *arbitration proceeding* and the enforcement of a resulting *award*," and "vacatur is not arbitration." *Id.* at 294 n.14 (the FAA's vacatur standards applied although the arbitration clause provided for "the arbitration" to be subject to state procedures). And we don't find it particularly significant that Brightstar made a single reference to the CRUAA in an earlier motion to vacate that was summarily denied. Even viewing this conduct collectively, we conclude that it doesn't *clearly* evidence the parties' intent that the CRUAA would apply to proceedings to enforce or vacate the arbitrator's final award.

¶ 23 Accordingly, we apply the FAA standards in our review of the district court's order.

III. Timeliness of Notice of the Motions to Vacate as to Ginsberg

¶ 24 Ginsberg contends that the district court erred by finding that Brightstar and Knobel timely served notice of their motions to vacate the arbitration award. We disagree.

A. Additional Facts

¶ 25 The arbitrator's award comprises two separate awards, issued a few months apart from one another.

¶ 26 First, on August 11, 2021, the arbitrator issued and delivered to the parties the merits award, in which he resolved all the claims the parties had submitted for arbitration. The arbitrator said that this award was his "award on the claims of the parties" and was "final in its scope" but that he would separately enter an award on attorney fees and costs and "[t]ogether, the two interim awards [would] constitute the Final Award."

¶ 27 Then, on October 26, 2021, the arbitrator issued and delivered to the parties the attorney fee and cost award. This award reiterated that the earlier award was "final in its scope" and that, together, the two awards constituted the "Final Award."

¶ 28 Ginsberg and Jordan opened a new court case and moved to confirm the arbitration award. Soon thereafter, that case was consolidated with the original case that had been opened when Brightstar filed its earlier motion to vacate an interim arbitration order. In filings in both cases, Ginsberg's counsel included their email addresses in their signature blocks.

¶ 29 A few days later, on November 9, 2021, Brightstar filed a motion to vacate the arbitration award, indicating in the certificate of service that it had served all parties through the Colorado courts

e-filing system and by email. The next day, Knobel filed his own motion to vacate the arbitration award, indicating in the certificate of service that he had served Ginsberg by email to his counsel.

¶ 30 The parties don't dispute that as of the time the motions to vacate were filed, Ginsberg's counsel (who were from out of state and were appearing pro hac vice) were not registered with the e-filing system. They also don't dispute that Ginsberg received actual notice of the motions to vacate.[3]

¶ 31 In January 2022, Brightstar and Knobel filed a motion for substituted service on Ginsberg, who'd moved to Puerto Rico and was allegedly evading personal service. After a hearing, the district court granted the motion but also indicated that substituted service

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[3] Ginsberg's counsel indicated for the first time at oral argument before this court that they didn't receive the emails with the motions to vacate but only received the motions from Jordan's counsel, who had been properly served. There is no indication in the record that Ginsberg ever raised this issue before the district court. Indeed, his responses to the motions to vacate didn't raise any service or timeliness issues, and in a later hearing before the district court, his counsel didn't disagree when counsel for Brightstar asserted that "we previously emailed to [Ginsberg's counsel] and all counsel the package" with the motions to vacate and attachments. We therefore decline to consider this contention. *See Melat, Pressman & Higbie, L.L.P. v. Hannon L. Firm, L.L.C.*, 2012 CO 61, ¶ 18 ("[I]ssues not raised in or decided by a lower court will not be addressed for the first time on appeal.").

wasn't necessary because the service on Ginsberg's counsel had been sufficient. Brightstar and Knobel then served Ginsberg by substituted service.

¶ 32 In its omnibus order, the court referred back to its earlier ruling at the January 2022 hearing and ruled that Brightstar and Knobel had timely served Ginsberg.

B. Standard of Review and Applicable Legal Standards

¶ 33 We review this issue de novo, as it, too, concerns a district court's legal conclusions on a motion to confirm or vacate an arbitration award. *See Price*, ¶ 6.

¶ 34 To the extent this issue requires us to interpret the Colorado Rules of Civil Procedure, our review likewise is de novo. *See Spiremedia Inc. v. Wozniak*, 2020 COA 10, ¶ 21. We interpret the language in the rules according to its commonly understood and accepted meaning. *State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 2023 CO 23, ¶ 34. We also "construe the rules liberally to effectuate their objective to secure the just, speedy, and inexpensive determination of every case." *Id.*; *accord* C.R.C.P. 1(a). If a procedural rule is clear and unambiguous, then we apply it as written. *Boudette v. State*, 2018 COA 109, ¶ 20.

¶ 35 The FAA requires "[n]otice" of a motion to vacate an arbitration award to be "served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12.

C. Application

¶ 36 Ginsberg argues that the arbitrator's August 11, 2021 merits award was final for purposes of judicial review, thus requiring service of notice of motions to vacate by November 11, 2021, but that Brightstar and Knobel didn't serve their motions to vacate (which were the "notice" of the motions to vacate) until January 2022. Thus, he argues, the motions were served beyond the three-month period provided by the FAA and should've been dismissed as untimely. *See* 9 U.S.C. § 12; *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007).

¶ 37 In response, Brightstar and Knobel give three reasons why the motions were timely: (1) they served the motions on Ginsberg's counsel through the e-filing system and/or by email on November 9 and 10, 2021, before the deadline; (2) even if they didn't serve the motions in November, the arbitration award didn't become final until the arbitrator issued the fee and cost award, and they served the motions within three months of that date; and (3) before the

service deadline, Knobel filed a pleading indicating that Ginsberg's motion to confirm was subject to the objections Knobel was lodging in his motion to vacate. We consider only the first reason, as we find it dispositive. Although we agree that there's no indication Ginsberg's counsel were served through the e-filing system by the deadline, they were effectively served via email by the deadline.

¶ 38 The FAA provides different means for service of notice of a motion to vacate, depending on whether the party being served is a resident of the federal judicial district within which the award was made. Because Ginsberg has conceded that he was a resident of the district at the time in question, the provision regarding service on residents applies. Under that provision, "service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court." 9 U.S.C. § 12.

¶ 39 This provision incorporates the standards for serving motions in the court where the action is commenced, which, here, means the Colorado Rules of Civil Procedure. Rule 5 addresses various means of serving pleadings and other papers, beginning with hand

delivery, mail, and leaving a copy with the clerk of court. As relevant here, it then provides that service may be accomplished by

> [d]elivering a copy by any other means, including E-Service, other electronic means or a designated overnight courier, consented to in writing by the person served. Designation of a facsimile phone number or an email address in the filing effects consent in writing for such delivery.

C.R.C.P. 5(b)(2)(D).

¶ 40 Like its federal counterpart, this rule allows service of a pleading or other paper to be accomplished by "other electronic means" that a person has "consented to in writing." Fed. R. Civ. P. 5(b)(2)(E). But unlike the federal rule, Colorado's rule adds that "[d]esignation of a facsimile phone number or an email address in the filing effects consent in writing for such delivery." C.R.C.P. 5(b)(2)(D).

¶ 41 Under the plain language of this provision, designating a fax number or an email address in a pleading or other paper filed with the court constitutes written consent for service by that means. And under C.R.C.P. 10(d)(2)(III), a "[f]ax number and e-mail address are optional" in a case caption. Thus, parties needn't provide such

contact information in their pleadings or other filed papers; but if they do, they thereby consent to receipt of service by that means.[4]

¶ 42 The history of Rule 5 supports this interpretation. Before the 2006 amendments, the rule provided, in relevant part,

> Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or by mailing it to him at his address as given in the pleadings or by sending it via facsimile machine transmission to a facsimile number if one is designated in the pleadings . . . .

C.R.C.P. 5(b) (2005). Thus, if an attorney provided a fax number in the pleadings, then service could be accomplished by faxing a pleading or other paper to that number. When Rule 5 was amended to mirror the federal rule — including by allowing service by a few specified means, as well as by "other" means if a person consented to them in writing — the Colorado Supreme Court added a new sentence providing that "[d]esignation of a facsimile phone number in the pleadings effects consent in writing for such delivery." Rule

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[4] Of course, in most districts, filing and service through the Colorado courts e-filing system is required, at least for represented parties. *See generally* C.R.C.P. 121, § 1-26(13) (judges may mandate e-filing and e-service for specific case classes, types of cases, or specific cases). As noted, however, in this case, Ginsberg's attorneys weren't registered with the e-filing system.

Change 2005(13), Colorado Rules of Civil Procedure (Amended and Adopted by the Court En Banc, Oct. 20, 2005), https://perma.cc/MZ4U-E9UU. Collectively, these changes moved Colorado's rule closer to the structure of the federal rule but retained the option of effectuating service by fax if a fax number had been provided in earlier pleadings.

¶ 43 The rule was amended again in 2012 to indicate that the designation of an email address or a fax number would constitute consent in writing for delivery by that means. Rule Change 2012(10), Colorado Rules of Civil Procedure (Amended and Adopted by the Court En Banc, June 21, 2012), https://perma.cc/B476-GT4B. At the same time, the word "pleadings" in the sentence that had been added in 2006 was amended to "filing," reflecting the fact that Rule 5 addresses service not only of "pleadings" but also "other papers" filed with the court. *Id.*

¶ 44 We therefore interpret Rule 5 to allow parties to be served by fax or email if they have provided a fax number or email address in their pleadings or other papers filed with the court. This means that, in this case, because Ginsberg's counsel had already filed pleadings providing their email addresses, service of the motions to

vacate on those email addresses was effective. That service was accomplished on November 9 and 10, 2021, ahead of the earliest possible deadline on November 11. Thus, irrespective of whether the arbitrator's merits award became final when it was issued or when the fee and cost award was issued, service was timely.

IV. Evident Partiality

¶ 45 Ginsberg and Jordan contend that the district court erred by vacating the arbitration award on the grounds of the arbitrator's evident partiality. We agree.

A. Standard of Review and Applicable Legal Standards

¶ 46 When reviewing a district court's ruling on a motion to vacate an arbitration award, we accept the court's findings of fact unless they are clearly erroneous and consider questions of law de novo. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995); *1745 Wazee LLC*, 89 P.3d at 425. Because in this case the relevant facts are undisputed and the district court didn't make any factual findings, our review is de novo.

¶ 47 Section 10 of the FAA identifies four grounds on which an arbitration award may be vacated, one of which is "evident partiality or corruption in the arbitrator[]." 9 U.S.C. § 10(a)(2). Vacating an

award on this basis requires the evidence of partiality to be direct, definite, and capable of demonstration — not remote, uncertain, or speculative. *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Pan.*, 78 F.4th 1252, 1263 (11th Cir. 2023); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982). To justify vacatur, a movant can't simply establish an appearance of bias; the movant must establish specific facts from which a reasonable person would have to conclude that the arbitrator was actually partial to one side. *OOGC Am., L.L.C. v. Chesapeake Expl., L.L.C.*, 975 F.3d 449, 453 (5th Cir. 2020); *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013).

B. Application

¶ 48 In vacating the arbitration award, the district court acknowledged that claims of partiality typically arise when an arbitrator has a relationship with a party or law firm. However, Brightstar and Knobel haven't cited evidence of any such relationship or any other conflict of interest or improper motive. Instead, their claim is based wholly on the arbitrator's conduct and rulings before, during, and after the hearing. We needn't decide whether such actions are ever sufficient to support vacatur of an

arbitration award. It is enough that we conclude the record doesn't support vacatur of the award in this case.

¶ 49 Like the district court, we have reviewed the arbitrator's conduct over the course of the 4,000-page hearing transcript, as well as the cited pre- and post-hearing rulings. But unlike the district court, we conclude that this record does not establish that the arbitrator was actually partial.

¶ 50 In support of the district court's decision, Brightstar points to nine ways it claims the arbitrator exhibited partiality: (1) interfering with witness examinations; (2) reacting to witness testimony; (3) making and sustaining his own objections; (4) prematurely ruling on an issue; (5) excluding evidence and shifting the burden of proof on an issue; (6) asserting jurisdiction over Knobel; (7) entering a preliminary injunction against Brightstar; (8) placing a time limit on Jordan's deposition; and (9) requiring Brightstar to disclose its claims of unfairness before he had issued his merits award. We address — and reject — each in turn.[5]

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[5] We needn't decide whether Brightstar properly tendered expert affidavits in support of its argument, as we conclude that, even considering those affidavits, it hasn't shown that the arbitrator was

1. Interfering with Witness Examinations

¶ 51 We first reject Brightstar's contention that the arbitrator interfered with witness examinations in a way that favored Ginsberg and Jordan, thus evidencing bias.

¶ 52 Most of Brightstar's examples of supposed interference simply reflect the arbitrator asking clarifying questions to counsel or to witnesses — something the arbitrator did to counsel and witnesses from both sides. Such questioning is within the arbitrator's discretion and doesn't suggest a bias for or against either side. *See* AAA, Commercial Arbitration Rules and Mediation Procedures, R-33(a) (Sept. 1, 2022), https://perma.cc/S644-4E6P (AAA Commercial Arbitration Rules) ("Witnesses for each party shall . . . submit to questions from the arbitrator . . . ."); *Gulfstream Aerospace Corp. v. Optical Air Data Sys., LLC*, 517 F. Supp. 3d 542, 564 (E.D. Va. 2021) (an arbitrator's questioning of witnesses didn't suggest partiality but, rather, "appropriate management of the arbitration hearing"); *Cook Chocolate Co. v. Salomon Inc.*, 748 F.

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evidently partial. Nor do we need to decide whether Brightstar waived its partiality argument by not raising it until after the close of evidence, as we reject the argument on its merits.

Supp. 122, 127-28 (S.D.N.Y. 1990) (an arbitration panel's questioning of witnesses was "well within the limits of its discretion" and didn't establish "a reasonable basis for accusations of bias"), *aff'd*, 932 F.2d 955 (2d Cir. 1991).

¶ 53 At times, the arbitrator directed counsel or witnesses to focus on specific issues. While Brightstar may describe such direction as "interfer[ing]" with witness examination, it was similarly within the arbitrator's discretion in managing the hearing. It was also not so one-sided as to suggest partiality and, if anything, demonstrated the arbitrator's preparedness and desire to move things along — which is understandable, given that the hearing was initially scheduled for two weeks but took three. *See* AAA Commercial Arbitration Rules, R-33(b) ("The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof . . . and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."); *Ballantine Books, Inc. v. Cap. Distrib. Co.*, 302 F.2d 17, 21 (2d Cir. 1962) ("A judge is not wholly at the mercy of counsel, and would be remiss if he did not participate in questioning to speed proceedings

and eliminate irrelevancies. A fortiori an arbitrator should act affirmatively to simplify and expedite the proceedings before him, since among the virtues of arbitration which presumably have moved the parties to agree upon it are speed and informality.") (citation omitted); *Fairchild & Co. v. Richmond, Fredericksburg & Potomac R.R. Co.*, 516 F. Supp. 1305, 1313 (D.D.C. 1981) ("[A]n arbitrator's legitimate efforts to move the proceedings along expeditiously may be viewed as abrasive or disruptive to a disappointed party. Nevertheless, such displeasure does not constitute grounds for vacating an arbitration award.").

¶ 54 Certainly, there were times when the arbitrator's interruptions went beyond a clarifying question or two. But the arbitrator's questioning remained primarily clarifying in nature, and when he asked a longer series of questions, he often apologized for the interruption or explained the reason for it. Accordingly, these occasions of being more active in questioning don't suggest bias.

¶ 55 Brightstar focuses in particular on the arbitrator's questioning of Knobel, which it says was "hostile, unfair, and shockingly improper." Its primary example is the lengthy questioning that the

district court described as "browbeat[ing] Knobel into admitting that he is bound by whatever documents he signs."

¶ 56 While we don't disagree that the arbitrator was heavy-handed in his questioning of Knobel on this point, his questions are fairly viewed as an attempt to manage an evasive witness and a lagging hearing. When Knobel testified that he didn't understand some communications his agent had made to Ginsberg and Jordan, the arbitrator asked him about his practice with respect to documents he didn't understand. Knobel agreed that he was bound by the documents he signed. But then he went on to claim an understanding of one operating agreement provision that was contrary to the agreement's plain language and to testify that he didn't understand another provision. When questioned by the arbitrator, he backtracked from his earlier admission that he was bound by what he signed — even as his counsel acknowledged that he was. The arbitrator repeatedly expressed concerns that if Knobel couldn't agree that the signed agreements spoke for themselves and were binding, and instead planned to testify about his own understanding of all the relevant provisions, it would significantly expand the length of the hearing. Still, it took Knobel quite some

time to stop qualifying his answers and finally acknowledge that he was bound by the documents he had signed.

¶ 57 Finally, as Brightstar notes, the arbitrator's active questioning at times put counsel in a position of having to decide whether to object to his questions. While we sympathize with counsel being put in an awkward position, neither Brightstar nor the district court has cited, and we haven't found, any authority indicating that such circumstances support a claim of partiality.

2. Reacting to Witness Testimony

¶ 58 We also reject Brightstar's contention that the arbitrator exhibited partiality in his reactions to witness testimony.

¶ 59 In addressing this issue, the district court cited the following comment by the arbitrator after Knobel answered a question: "That was an interesting answer. I'm just commenting to myself. I'm sorry." Brightstar doesn't explain, and we don't see, how such a comment evinces any sort of bias.

¶ 60 The court also cited a dialogue suggesting the arbitrator was rolling his eyes and shaking his head during Knobel's testimony:

> [COUNSEL FOR BRIGHTSTAR AND KNOBEL]: [Arbitrator], I see you shaking your head and being impatient with Mr. Knobel. I ask you

please be patient with him. . . . Can we just work with this for now and I will get out during the direct examination what the issue is.

ARBITRATOR: I'm not sure why you think I'm being impatient with the witness. I'm attempting to give him every opportunity possible to answer the question that's propounded to him. When he does not answer the question, I may shake my head because then I went ahead and asked you to direct him to answer the question.

COUNSEL: Right. And what I'm perceiving, [Arbitrator], is irritation and rolling of the eyes. And I'm — I say this with respect. This is my perception of what I see.

ARBITRATOR: Fine. You can stop right then and there. I'm not interested in your perception.

COUNSEL: Just putting on the record, [Arbitrator], please.

ARBITRATOR: Go ahead.

COUNSEL: Just putting it on the record, as you have invited me to do.

ARBITRATOR: I have no comment on anything that you have said, [Counsel]. Except that I expect the witness to answer a question when it's propounded to him. Not to give a lecture or an . . . expanded statement that does not answer the question. I just asked you to direct your client to answer the question as it's propounded to him. If you find that to be somehow or another inappropriate on my part, then I apologize. I do not intend to reflect

> anything other than frustration with a witness who will not answer the questions.

¶ 61 While the arbitrator rolling his eyes or shaking his head was undoubtedly unprofessional, it doesn't lead us to conclude that he was biased. Indeed, the arbitrator's own explanation for his conduct is that he was frustrated because the witness was evading questions — something the record bears out.

¶ 62 We therefore conclude that this conduct doesn't evidence partiality. *See Stone v. Bear, Stearns & Co.*, 872 F. Supp. 2d 435, 447 (E.D. Pa. 2012) ("The law cannot make it too easy for arbitration losers to overturn unfavorable decisions by claiming that an arbitrator made a stray negative comment; or rolled his eyes; or looked askance at one person or another. The 'actual bias' standard protects an arbitration award against these kinds of easily manufactured and largely frivolous challenges."), *aff'd*, 538 F. App'x 169 (3d Cir. 2013); *Fairchild & Co.*, 516 F. Supp. at 1313 ("[A] disappointed party's perception of rudeness on the part of an arbitrator is not the sort of 'evident partiality' contemplated by the [FAA] as grounds for vacating an award. During the course of a

hearing, it is to be expected that an arbitrator may develop an opinion and perhaps even express it.").

3. Making and Sustaining Objections

¶ 63 Next, we reject Brightstar's contention that the arbitrator evidenced partiality by making and sustaining his own objections.

¶ 64 Notably, most of the arbitrator's objections were grounded in concerns over time management — a theme the arbitrator raised throughout the hearing. Many of these objections were that a document spoke for itself and didn't need to be read into the record or that a question had already been asked and answered.

¶ 65 Although the arbitrator sustained his own objections on other bases as well, Brightstar doesn't contend that any of those rulings were erroneous. Nor were the objections lodged only as to one side of the case. Under these circumstances, we perceive the objections as active management of the hearing — not evidence of bias. *See generally* AAA Commercial Arbitration Rules, R-33(b).

4. Prematurely Ruling on an Issue

¶ 66 We also reject Brightstar's contention that the arbitrator improperly ruled on an issue prematurely, evidencing his partiality.

¶ 67 Brightstar cites the arbitrator's remarks early in the hearing regarding the right of first offer claim. During Jordan's testimony on the second day of the hearing, the arbitrator commented,

> I think the intention of . . . seeking an offer is the key into the [right of first offer] provision. It's pretty clear that there was an intention to seek an offer by Mr. Knobel. I don't see that as being supported by any of the evidence you have provided so far for Mr. Jordan. So please proceed if you can establish that, and we'll go from there.

Then, on the fourth hearing day, the arbitrator expressed,

> I can tell you that I read [the operating agreement] and would rule, if asked to rule upon it, that the formation of an intent by Mr. Knobel to approach a sale of the property, of his interest to any outside purchaser triggers the [right of first offer].
>
> . . . .
>
> [A]s I think I've already ruled, and I figured that it was my opinion that the actions of Mr. Knobel with respect to the secret [letter of intent] triggered the [right of first offer]. . . . So my preliminary ruling is what my preliminary [ruling] was.

¶ 68 Brightstar doesn't cite any authority indicating that an arbitrator's expression of preliminary thoughts on the issues evinces partiality. To the contrary, as one court put it, "an arbitrator is not precluded from developing views regarding the

merits of a dispute early in the proceedings, and an award will not be vacated because he expresses those views." *Spector v. Torenberg*, 852 F. Supp. 201, 209 (S.D.N.Y. 1994); *see also United Indus. Workers, Serv., Transp., Pro. Gov't of N. Am. v. Gov't of V.I.*, 987 F.2d 162, 171-72 (3d Cir. 1993) (An arbitrator's "gratuitous remarks about the merits d[id] not indicate any bias."); *Ballantine Books*, 302 F.2d at 21 ("It is to be expected that after . . . an arbitrator has heard considerable testimony, he will have some view of the case. As long as that view is one which arises from the evidence and the conduct of the parties it cannot be fairly claimed that some expression of that view amounts to bias.").

5. Excluding Evidence and Shifting the Burden of Proof

¶ 69 We next reject Brightstar's contention that the arbitrator demonstrated partiality by excluding its evidence and improperly shifting the burden to it on an issue regarding causation.

¶ 70 Brightstar first points to the arbitrator's exclusion of its proffered expert testimony on causation of damages for the right of first offer claim. The arbitrator explained that he was excluding that testimony because "[c]ausation is fundamentally an issue of law" and he didn't "need [an expert's] opinion as to causation." He

later ruled that another expert could not opine on the causation of damages, as that was within his province.

¶ 71 We don't perceive these rulings as indicative of bias. The arbitrator had discretion to determine that expert testimony would not be helpful in deciding the issue of causation and, thus, would not be admitted. *See* AAA Commercial Arbitration Rules, R-35(b) ("The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be . . . irrelevant."); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 545 (2d Cir. 2016) ("[P]rocedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive or exclude, are left to the sound discretion of the arbitrator and should not be second-guessed by the courts.").

¶ 72 Brightstar also points to the arbitrator's ruling that Brightstar and Knobel bore the burden of proof on any deduction to damages based on financing costs. This ruling recognized that the issue of financing wasn't part of Ginsberg's and Jordan's damages claims, which were based on the value of Brightstar's interest in Native Roots minus the amount they would've had to pay for that interest,

but, instead, was an offset to damages based on the amount they would've had to incur to finance the purchase of Brightstar's interest. Brightstar bore the burden of proof as to the offset, so the arbitrator didn't improperly shift any burden. *See DSCO, Inc. v. Warren*, 829 P.2d 438, 442 (Colo. App. 1991) (Once the plaintiff establishes its damages resulting from a breach of contract, the burden of proof is upon the breaching party "to produce evidence on which any reduction of damages is to be predicated.").

¶ 73 And, more fundamentally, the mere fact that the arbitrator ruled against Brightstar on these two issues didn't indicate any bias. *See Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 75 (2d Cir. 2012) ("[A]dverse rulings alone rarely evidence partiality, whether those adverse rulings are made by arbitrators or by judges.") (citations omitted); *Sheet Metal Workers Int'l Ass'n Loc. Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) ("Even repeated rulings against one party to the arbitration will not establish bias absent some evidence of improper motivation.").

6. Asserting Jurisdiction over Knobel

¶ 74 Furthermore, we reject Brightstar's contention that the arbitrator's "relentless pursuit of arbitral jurisdiction over Knobel" evidences partiality.

¶ 75 Although we conclude, in Part VI of this opinion, that the arbitrator lacked jurisdiction over Knobel, that doesn't mean the assertion of jurisdiction indicated bias. *See Scandinavian Reinsurance Co.*, 668 F.3d at 75; *Sheet Metal Workers*, 756 F.2d at 746. And while Brightstar accuses the arbitrator of asking questions at the hearing regarding the theory that Brightstar and Knobel are alter egos, Brightstar acknowledges that Ginsberg and Jordan had previously raised that theory. Thus, it wasn't the arbitrator who first injected the theory into the case. We see nothing about the arbitrator's assessment of the issue indicating bias for or against any party.

7. Entering a Preliminary Injunction Against Brightstar

¶ 76 We also reject Brightstar's contention that the arbitrator exhibited bias by entering a preliminary injunction against Brightstar early in the case without holding a hearing. (The facts regarding the injunction are described in Part VII.A of this opinion.)

¶ 77 Brightstar bases this contention on an assertion that "[t]he arbitrator's conduct" in entering the injunction without a hearing "is inexplicable except by bias." But Brightstar cites no authority indicating that a hearing was required. And the "assertion that [a] ruling[] could only be explained by bias against [a party] is too speculative to support vacatur of the [a]ward." *Transp. Workers Union of Am., Local 252 v. Veolia Transp. Servs., Inc.*, 211 F. Supp. 3d 505, 514 (E.D.N.Y. 2016); *see also Scandinavian Reinsurance Co.*, 668 F.3d at 75; *Sheet Metal Workers*, 756 F.2d at 746.

¶ 78 The arbitrator's order issuing the preliminary injunction was well reasoned and grounded in the arbitrator's assessment of the appropriateness of injunctive relief based on the detailed briefing, exhibits, and declarations submitted to him. We don't discern any bias from the arbitrator's decision to award injunctive relief or to vacate his previously scheduled hearing on the issue.

8. Limiting Jordan's Deposition

¶ 79 For similar reasons, we reject Brightstar's contention that the arbitrator's order limiting its deposition of Jordan to only one hour indicates evident partiality.

¶ 80 In support of this contention, Brightstar cites reasons it believes warranted a longer deposition and the fact that no party had requested a limit on the length of the deposition. But, again, merely suggesting that an arbitrator's decisions can be explained only by bias is not sufficient. *See Transp. Workers Union*, 211 F. Supp. 3d at 514. And the arbitrator had the discretion to control the length of the depositions. *See* AAA Commercial Arbitration Rules, R-33(b); *id.* at L-3(e)-(f) (granting arbitrators the authority in large, complex commercial disputes to order depositions and "resolve any disputes concerning the pre-hearing exchange and production of documents and information"); *Nat'l Football League*, 820 F.3d at 545.

¶ 81 At any rate, the arbitrator explained his reasons for limiting the deposition, dispelling any conclusion that it was based on bias. The arbitrator had previously ruled that each party could take one deposition of up to six hours but had to avoid repetition when both parties on one side of the case raised similar claims or defenses. After the parties sought clarification on the length of depositions, the arbitrator ruled that because Brightstar and Knobel had already deposed Ginsberg for the full six hours, and because Ginsberg's

and Jordan's claims were materially the same, Brightstar and Knobel could only depose Jordan for one hour on issues truly unique to him that hadn't been covered in Ginsberg's deposition. There is nothing about this ruling that suggests bias.

9. Requiring Brightstar to Disclose Claims of Unfairness

¶ 82 Finally, we reject Brightstar's contention that the arbitrator was evidently biased because he required it to disclose its claims of unfairness before issuance of the merits award.

¶ 83 After the parties had submitted their proposed findings of fact and conclusions of law and presented their closing arguments, the arbitrator asked counsel for Brightstar and Knobel about a statement in their proposals indicating the procedure hadn't been fair and equitable. Counsel initially cited the simultaneous submission of proposed findings and conclusions and the thirty-minute limit on closing arguments. After a brief discussion of those items, the arbitrator asked, "Is there any other aspect of these proceedings that you consider to be unfair and inequitable?" Counsel for Brightstar and Knobel answered, "There are."

¶ 84 The arbitrator then instructed,

> What I'm going to ask you to do is send me a summary of whatever prejudices you think you have suffered as a result of the procedures I have adopted for this arbitration. I want to get that cleared up before I issue my opinion so that we don't have to deal with it at some point down the road that you say that this was an unfair proceeding. I cannot candidly conceive how this proceeding could have been more fair to the parties. The parties have been given an extraordinary range of ability and procedures to develop their facts of this case, including a hearing that ran a week longer than originally was scheduled. So if you have prejudice, if you've suffered prejudice that you believe goes to the ultimate fairness and inequity of this proceeding, I want to know about it before I enter my ruling so I'm not faced with some claim down the road that I have been unfair to you and your clients.

¶ 85 Later, the arbitrator extended this request to all parties:

> If anyone else has a complaint similar to that voiced by [counsel for Brightstar and Knobel] as to prejudice visited upon them or their clients by the procedures that we followed in this arbitration, you are ordered to advise me of those complaints in reasonable detail . . . .

¶ 86 Brightstar and Knobel submitted a letter detailing the arbitrator's actions throughout the proceeding — including many of the same actions now challenged on appeal — that they said exhibited the arbitrator's partiality. They also indicated their intent to file a motion with the AAA to disqualify the arbitrator.

¶ 87 In response, the arbitrator emailed an AAA administrator acknowledging that he wouldn't be given the opportunity to review or respond to any motion to disqualify but offering his perspective on the lengthy arbitration proceedings and his management of those proceedings. The AAA denied the disqualification motion just before the merits award was issued.

¶ 88 Brightstar compares the arbitrator's request of the parties to the situation presented in *Thomas Kinkade Co. v. White*, where an arbitrator's disclosure of a conflict of interest five years into an arbitration proceeding put the affected party in the difficult position of having to decide whether to lodge an objection and risk offending the arbitrator. 711 F.3d 719, 724-25 (6th Cir. 2013). But the situations are not similar. We don't read the arbitrator's request as seeking the disclosure of any allegations of bias or motions to disqualify before he issued his merits award. Instead, his request plainly addressed "procedures" he had adopted. We don't see anything nefarious, or otherwise indicative of bias, about asking the parties to lodge any complaints about unfair procedures before a proceeding has concluded.

¶ 89 We also don't infer any bias based on the arbitrator's reaction to Brightstar and Knobel's letter. Brightstar and Knobel can't create evidence of bias by submitting complaints about alleged bias that extended far beyond the arbitrator's request and then suggesting the arbitrator may have been upset by their complaints. *Cf. Toyota of Berkeley v. Auto. Salesman's Union, Loc. 1095*, 834 F.2d 751, 757 (9th Cir. 1987) ("It would be an odd result to hold that a party to arbitration can manufacture bias by naming the arbitrator in a suit to enjoin the arbitration. It would be equally inappropriate to find bias in any reasonable action taken in defense of that suit by the arbitrator. Such a result would allow a party who is reluctant to arbitrate a foolproof way to disqualify the arbitrator, by filing a suit."). And regardless of whether the arbitrator's email to the AAA may have violated any AAA rules — an issue not before us — it doesn't suggest any evident partiality. Instead, it simply reflects "the arbitrator's desire to justify [his] actions." *Bronx-Lebanon Hosp. Ctr. v. Signature Med. Mgmt. Grp., L.L.C.*, 775 N.Y.S.2d 279, 281 (App. Div. 2004) (an arbitrator's letter to a court regarding a motion to disqualify the arbitrator was not indicative of bias).

10. Conclusion

¶ 90 Even considering all these actions together, we cannot conclude that the arbitrator's conduct reveals evident partiality. Accordingly, we conclude that the district court erred by vacating the arbitration award on that basis.

V. Alternative Grounds for Vacating the Arbitration Award

¶ 91 Brightstar contends that, even if we reject the district court's ruling on evident partiality, there are other bases under the FAA to vacate the arbitration award. These bases — which Brightstar raised in response to Ginsberg's and Jordan's appeals and in its cross-appeal — are that the arbitrator (1) committed misconduct; (2) didn't provide a fair hearing; and (3) exceeded his powers. Although the district court didn't rule on most of these bases, we consider them as alternative grounds to support the judgment. *See McLellan v. Colo. Dep't of Hum. Servs.*, 2022 COA 7, ¶ 10 ("An appellate court may . . . affirm on any ground supported by the record." (quoting *Taylor v. Taylor*, 2016 COA 100, ¶ 31)).[6]

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[6] To be clear, a cross-appeal is not necessary to seek affirmance of a judgment on alternative grounds. *See Fonden v. U.S. Home Corp.*, 85 P.3d 600, 602 (Colo. App. 2003) ("[A]n appellee . . . may, without

A. Standard of Review and Applicable Legal Standards

¶ 92 To the extent that the district court considered some of these issues, we review its legal rulings de novo. *See First Options*, 514 U.S. at 947-48; *1745 Wazee LLC*, 89 P.3d at 425.

¶ 93 In addition to evident partiality, the FAA specifies three other bases for vacatur of an arbitration award: (1) the award was procured by corruption, fraud, or undue means; (2) the arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause, in refusing to hear material evidence, or through other misbehavior that prejudiced a party's rights; or (3) the arbitrator exceeded the arbitrator's powers or so imperfectly executed those powers that there was no mutual, final, and definite award upon the subject matter. 9 U.S.C. § 10(a)(1), (3)-(4). The Supreme Court has held that the four bases identified in the FAA are exclusive, providing the only grounds on which to vacate an

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filing a notice of cross-appeal, raise arguments in support of a judgment that would not increase its rights under the judgment."). Thus, "seeking affirmance of [a] judgment on other grounds is not a proper basis for a cross-appeal." *Archangel Diamond Corp. v. Arkhangelskgeoldobycha*, 94 P.3d 1208, 1220 (Colo. App. 2004), *aff'd in part and rev'd in part on other grounds sub nom. Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005).

award. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); *see also Indus. Steel Constr., Inc. v. Lunda Constr. Co.*, 33 F.4th 1038, 1041 (8th Cir. 2022); *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 353 (5th Cir. 2009). Judicial review on these grounds is extremely limited, as "review of arbitral awards is among the narrowest known to law." *Mid Atl. Cap. Corp. v. Bien*, 956 F.3d 1182, 1189 (10th Cir. 2020) (quoting *THI of N.M. at Vida Encantada, LLC v. Lovato*, 864 F.3d 1080, 1083 (10th Cir. 2017)).

B. Misconduct and an Unfair Hearing

¶ 94 We consider Brightstar's first two alternative bases — misconduct and an unfair hearing — together because they concern similar actions by the arbitrator. Moreover, the alleged failure to provide a fair hearing is not one of the specified bases for vacating an arbitration award. *See* 9 U.S.C. § 10(a). Instead, courts often consider such arguments in conjunction with allegations of misconduct under § 10(a)(3), concluding that an arbitrator's misconduct prejudices a party's rights, and thus provides a basis for vacatur, only if it results in a fundamentally unfair hearing. *See, e.g.*, *Move, Inc. v. Citigroup Glob. Mkts., Inc.*, 840 F.3d 1152,

1158 (9th Cir. 2016); *Rainier DSC 1, L.L.C. v. Rainier Cap. Mgmt., L.P.*, 828 F.3d 362, 364 (5th Cir. 2016).

¶ 95 Brightstar contends that the arbitrator committed misconduct and deprived it of a fair hearing by excluding its causation evidence, shifting to it the burden on that issue, amending a provision of the operating agreement through its factual findings, awarding speculative damages, prematurely ruling on an issue, and ordering disclosure of disqualifying facts before issuing the merits award.

¶ 96 Brightstar fails to develop these arguments or cite relevant case law supporting them. It provides skeletal information on the legal standards and then simply lists actions it challenges. While it cites a few cases, only one is an arbitration case, and even that case doesn't directly support its argument.

¶ 97 Meanwhile, the extensive body of case law applying the FAA indicates that, in light of the limited scope of judicial review, courts shouldn't second-guess an arbitrator's discretionary decisions in conducting a hearing absent a violation of fundamental fairness. *See, e.g.*, *Nat'l Football League*, 820 F.3d at 545; *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1175 (9th Cir. 2010); *Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1333 (11th

Cir. 2007). Courts have found vacatur appropriate under § 10(a)(3) in limited circumstances, such as when arbitrators received ex parte evidence that affected the outcome, consulted with experts after the hearing, lied about their qualifications, or failed to allow a party to present any evidence. *See, e.g.*, *Move, Inc.*, 840 F.3d at 1158 (citing cases); *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 390 (4th Cir. 2000).

¶ 98 Nothing Brightstar challenges rises to that level. And Brightstar hasn't developed or supported any argument indicating that the actions it challenges resulted in a fundamentally unfair proceeding. Accordingly, we reject this contention. *See In re Estate of Chavez*, 2022 COA 89M, ¶ 26 ("We don't consider undeveloped and unsupported arguments." (quoting *Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC*, 2020 COA 34, ¶ 41 n.12)).

C. Exceeding Powers

¶ 99 We now turn to Brightstar's third alternative basis: that the arbitrator exceeded his powers.

¶ 100 Brightstar challenges some of the same actions it referenced in its arguments about misconduct and an unfair hearing. But, again,

it doesn't develop the arguments. Thus, we decline to consider them for the same reasons cited above. *See id.*

¶ 101 The one contention Brightstar develops is that, in effect, the arbitrator amended the operating agreement in two ways.

¶ 102 First, Brightstar argues that the arbitrator misapplied the language of the operating agreement's right of first offer provision in finding that Brightstar had breached that provision. Brightstar maintains that the right of first offer is triggered only when a member's proposed sale of a membership interest is to a third party that is eligible to own equity in a marijuana business in Colorado, yet the company to which it had proposed a sale wasn't eligible to own equity in a marijuana business in Colorado.

¶ 103 Second, Brightstar argues that the arbitrator awarded speculative damages, even though the operating agreement's arbitration clause expressly states that "[t]he Arbitrator shall not have the right to award . . . speculative damages to either party." Brightstar maintains that to prevail on the right of first offer claim, Ginsberg and Jordan had to prove that they were ready, willing, and able to buy Brightstar's seventy percent interest in Native Roots

for $20 million, yet there was no evidence that they could've raised that amount of money.

¶ 104 In arguing that the arbitrator thus exceeded his powers, Brightstar cites the language in the arbitration clause providing that "[t]he Arbitrator . . . shall not have the power to amend this Agreement." Brightstar also relies on *CP Kelco US, Inc. v. International Union of Operating Engineers, Local 627*, 381 F. App'x 808 (10th Cir. 2010), in which the Tenth Circuit affirmed the vacatur of an arbitration award involving a collective bargaining agreement (CBA) on the basis that the award "did not draw its essence from the CBA and . . . the arbitrator had exceeded his authority under the CBA." *Id.* at 809. In doing so, the Tenth Circuit concluded that the arbitrator improperly amended the CBA by acknowledging that the CBA unambiguously didn't include a specific requirement but imposing that requirement anyway based on a previous version of the CBA. *Id.* at 814-15.

¶ 105 Although Brightstar frames its argument as disputing an improper *amendment* of the operating agreement, in actuality, what it disputes is the arbitrator's *interpretation* and *application* of the operating agreement. Those are matters properly addressed by the

arbitrator. "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (alterations in original) (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)). That is essentially what the Tenth Circuit confronted in the *CP Kelco* case; but it's not what we're confronted with in this case. Instead, Brightstar's challenges concern alleged errors in interpreting the operating agreement's right of first offer provision and assessing the evidence on liability and damages under that provision.

¶ 106 But "[i]t is not enough for [a movant] to show that the [arbitrator] committed an error — or even a serious error." *Stolt-Nielsen*, 559 U.S. at 671. "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand,

regardless of a court's view of its (de)merits." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (quoting *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000)).

¶ 107 Thus, "[t]he sole question for [this court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.* It is clear that the arbitrator did interpret the parties' contract. He issued a detailed order explaining how the right of first offer provision applied, why he found that Brightstar had violated that provision, and why he found that Ginsberg and Jordan were entitled to damages. That is sufficient to end our inquiry. "Even if [Brightstar] is right that the arbitrator did not *correctly* interpret the Agreement, he nonetheless interpreted it. And that is enough." *Hoolahan v. IBC Advanced Alloys Corp.*, 947 F.3d 101, 118 (1st Cir. 2020).

¶ 108 Accordingly, we reject this alternative basis for affirmance.

VI. Arbitral Jurisdiction over Knobel

¶ 109 Having concluded that the district court erred by vacating the entire arbitration award on the basis of partiality and that the other asserted bases don't warrant vacatur of the entire award, we now

turn to the other basis the court applied for vacating the award against Knobel individually — its conclusion that the arbitrator lacked jurisdiction over Knobel. Ginsberg and Jordan contend that this conclusion was erroneous. We disagree.

A. Standard of Review

¶ 110 Our standard of review on this issue depends on whether the question of arbitral jurisdiction over Knobel is a matter to be resolved by the arbitrator or by the court. When parties have submitted a question regarding arbitrability to arbitration, a court defers to the arbitrator's arbitrability decision, reviewing that decision under the same standard the court would apply to any other matter the parties agreed to arbitrate. *First Options*, 514 U.S. at 943. But if the parties haven't submitted the question of arbitrability to arbitration, a decision on the issue is one subject to independent — that is, de novo — review. *Id.* at 943, 948.

¶ 111 When deciding whether the parties agreed to arbitrate an issue, courts generally apply the same principles that govern the formation of contracts. *Id.* at 944. However, courts don't assume the parties agreed to arbitrate the issue of arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. *Id.*

(alteration in original) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

¶ 112 Because Knobel is not a signatory of Native Roots' operating agreement, we don't consider the language in the operating agreement to resolve this issue. *See N.A. Rugby Union LLC v. U.S. Rugby Football Union*, 2019 CO 56, ¶ 32 (parties' intent in a contract to submit issues of arbitrability to the arbitrator can't bind a nonparty to the contract absent some legal or equitable basis for doing so). So we consider whether there is some other indication that Knobel exhibited a clear and unmistakable intent to arbitrate the issue of arbitrability.

¶ 113 Ginsberg and Jordan acknowledge that Knobel objected to the assertion of arbitral jurisdiction over him, both in his answer to the arbitration demand and in later pleadings filed in the arbitration. But they argue that by filing objections in the arbitration, without challenging the arbitrator's authority to resolve those objections, Knobel clearly and unmistakably submitted the issue of arbitrability to the arbitrator. This argument is foreclosed by the United States Supreme Court's decision in *First Options*.

¶ 114 In *First Options*, the Supreme Court rejected an argument that three parties on one side of a dispute had clearly agreed to have arbitrators decide the question of arbitrability by filing a pleading in the arbitration objecting to the arbitrators' jurisdiction. 514 U.S. at 946. The Court reasoned that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point." *Id.* "To the contrary," the Court added, "insofar as [the parties] were forcefully objecting to the arbitrators deciding their dispute . . . , one naturally would think that they did *not* want the arbitrators to have binding authority over them." *Id.* Thus, the Court held that the issue of arbitrability was subject to independent court review. *Id.* at 947.

¶ 115 In seeking to avoid the reasoning and result in *First Options*, Ginsberg and Jordan turn to *Suez WTS Services USA, Inc. v. Aethon United BR LP*, No. 20-CV-2129, 2020 WL 6134905 (D. Colo. Oct. 19, 2020) (unpublished order), in which the United States District Court for the District of Colorado distinguished and declined to apply *First Options*. *Id.* at *6-8. In that case, the party opposing arbitrability included in its response to the arbitration demand an

objection to the arbitrator's jurisdiction over the claims. *Id.* at *6. But the party didn't thereafter pursue that objection, instead filing a motion to dismiss regarding an issue that touched on arbitrability but was substantially intertwined with the merits. *Id.* at *6-7. Only after the arbitrator denied the motion to dismiss did the party again raise the issue of arbitrability. *Id.* at *7. Under those circumstances, the court concluded the party had waived the objection. *Id.* at *7-8.

¶ 116 Here, however, Knobel directly opposed arbitrability before the arbitrator decided the merits. And in many cases with facts closer to those in this case, courts — including a division of this court — have concluded that presenting an issue of arbitrability to an arbitrator didn't establish consent to have the arbitrator decide that issue. *See, e.g.*, *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093, 1098 (Colo. App. 2009); *Oehme, van Sweden & Assocs., Inc. v. Maypaul Trading & Servs. Ltd.*, 902 F. Supp. 2d 87, 96-97 (D.D.C. 2012); *Katz v. Feinberg*, 167 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2001), *aff'd*, 290 F.3d 95 (2d Cir. 2002); *Olde Disc. Corp. v. Young*, 113 F. Supp. 2d 1229, 1232 (N.D. Ill. 2000); *Prudential Sec., Inc. v. Emerson*, 905 F. Supp. 1038, 1043-44 (M.D. Fla. 1995).

¶ 117 Ginsberg and Jordan also suggest that Knobel's pleadings opposing the arbitrator's jurisdiction should be treated differently because he included a cite to AAA Commercial Arbitration Rule R-7, which authorizes arbitrators to rule on matters relating to their jurisdiction. The parties to the operating agreement had already determined that the AAA commercial arbitration rules would apply to any arbitration proceedings, so Knobel's cite was merely a reference to the rules those parties had agreed upon. It didn't necessarily signal his agreement with application of those rules — much less his clear and unmistakable intent to allow the arbitrator to decide the issue of arbitrability.

¶ 118 Finally, Ginsberg and Jordan point out that Knobel waited to challenge the arbitrator's jurisdictional decision in court until after the arbitrator had entered his final decision. But we don't find it significant that Knobel waited until the award was final to file a court challenge. He'd already preserved the issue, and even after the arbitrator ruled on jurisdiction, he'd noted his continued objection to arbitral jurisdiction. That doesn't manifest any clear and unmistakable intent for the arbitrator to decide arbitrability.

¶ 119 Accordingly, we conclude that Knobel didn't clearly and unmistakably submit the question of arbitrability to the arbitrator. Therefore, like the district court, we afford no deference to the arbitrator's decision. In this situation, where we have access to the same record before the district court, it's unclear whether we apply a de novo standard or a more deferential standard to the district court's determination on the merits of the arbitrability question. We needn't resolve that issue because we conclude that, under any standard, the district court was correct in determining that the arbitrator lacked jurisdiction over Knobel.

B. Applicable Legal Standards

¶ 120 Because arbitration is a matter of contract, generally someone who, like Knobel, is not a party to an agreement with an arbitration clause cannot be compelled to arbitrate a dispute under that agreement. *See N.A. Rugby Union*, ¶ 20. However, the Colorado Supreme Court has recognized seven possible exceptions to this rule: (1) incorporation of an arbitration clause by reference in another agreement; (2) assumption of the arbitration obligation; (3) agency; (4) veil-piercing/alter ego; (5) estoppel; (6) successor-in-interest; and (7) third-party beneficiary. *Id.* at ¶¶ 21-22.

C. Application

1. Veil-Piercing/Alter Ego

¶ 121 Ginsberg and Jordan rely primarily on the same exception the arbitrator applied to exercise jurisdiction over Knobel — a veil-piercing/alter ego theory.

¶ 122 Generally, a corporate entity is treated as a separate legal entity from its officers, directors, and shareholders — or, in this case, its members. *See Sedgwick Props. Dev. Corp. v. Hinds*, 2019 COA 102, ¶ 15. This corporate veil isolates the liabilities of the entity from those of the individuals who invest in and run it, shielding those individuals from personal liability for the entity's debts. *Stockdale v. Ellsworth*, 2017 CO 109, ¶ 18; *Sedgwick Props.*, ¶ 15. In certain extraordinary circumstances, however, that veil may be pierced, subjecting the individuals to the entity's liabilities. *Stockdale*, ¶ 18; *see also N.A. Rugby Union*, ¶¶ 21-22.

¶ 123 To pierce the corporate veil, a fact finder must find three elements by a preponderance of the evidence: (1) the entity is the "alter ego" of the individual; (2) justice requires recognizing the substance of the relationship between the entity and the individual over the form because the corporate fiction was used to perpetrate a

fraud or defeat a rightful claim; and (3) disregarding the corporate form will achieve an equitable result. *Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶¶ 28-31; *Sedgwick Props.*, ¶ 21.

¶ 124 As to the first element, an alter ego relationship exists when an entity is a mere instrumentality for the transaction of an individual's own affairs and the unity of interest in ownership is such that the separate personalities of the entity and the individual no longer exist. *Dill*, ¶ 28. This element entails consideration of several factors, including whether (1) the entity is operated as a distinct business entity; (2) funds and assets are commingled; (3) adequate business records are maintained; (4) the nature and form of the entity's ownership and control facilitate misuse by an insider; (5) the entity is used as a "mere shell"; (6) the entity is thinly capitalized; (7) legal formalities are disregarded; and (8) the entity's funds or assets are used for non-business purposes. *Id.* at ¶ 29. Courts consider the specific facts of each case and needn't find that every factor is satisfied to find an alter ego. *Id.* Moreover, where, as here, the entity in question is a single-member LLC, some of the factors don't readily apply. *Sedgwick Props.*, ¶ 36.

¶ 125 We agree with the district court's conclusion that the arbitration record doesn't establish by a preponderance of the evidence that Brightstar and Knobel are alter egos.

¶ 126 Most of the evidence Ginsberg and Jordan cite relates to the first alter ego factor — whether the entity is operated as a distinct business entity. For instance, they point out that Knobel controlled Brightstar's actions; Knobel, his counsel, and others referred to Brightstar and Knobel interchangeably during the arbitration hearing, with Knobel at one point saying, "I am Brightstar"; and Knobel sometimes signed documents and took actions indicating that *he* personally was a member of Native Roots when, in fact, it was *Brightstar* that was a member.

¶ 127 These facts aren't of great consequence, given that Brightstar is a single-member LLC. The General Assembly has provided that, for purposes of veil piercing, "the failure of [an LLC] to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the members for liabilities of the [LLC]." § 7-80-107(2), C.R.S. 2023. Moreover, a division of this court has pointed out that "LLCs are often operated with less formality [than traditional

corporations]," especially when there is only one member. *Sedgwick Props.*, ¶ 52 (alteration in original) (quoting 1 Stephen A. Hess, *Colorado Practice Series: Methods of Practice* § 5:9, Westlaw (8th ed. database updated May 2019)); *see also id.* at ¶¶ 50-51. And, as the district court pointed out, the record suggests that Knobel may not have understood some of the questioning at the hearing, particularly relating to the corporate form.

¶ 128 Jordan and Ginsberg don't cite evidence supporting findings by a preponderance of the evidence on the remaining alter ego factors. They cite evidence that Knobel kept some of Native Roots' real estate assets and associated liabilities on his personal balance sheet for tax purposes and transferred some stock out of Native Roots and into a company owned by his children's trust. But those matters involved Knobel's actions vis-a-vis *Native Roots* — not necessarily *Brightstar* — and thus have little bearing on whether Brightstar and Knobel were alter egos. And other hearing evidence suggests that Brightstar was not thinly capitalized, given that it lent $50 million to Native Roots. *See id.* at ¶ 58 (the fact that an entity raised money, was able to obtain needed funding, and paid off a loan indicated that it was adequately capitalized).

¶ 129 We therefore agree with the district court that the evidence doesn't show that Brightstar and Knobel were alter egos. Thus, we agree with that court's conclusion that the veil-piercing/alter ego exception doesn't apply, and we needn't consider the other two elements for piercing the corporate veil. *See id.* at ¶ 64.

2. Other Exceptions

¶ 130 Ginsberg and Jordan also allude to some of the other exceptions to the general rule against subjecting a nonsignatory to an arbitration agreement. *See N.A. Rugby Union*, ¶¶ 21-22. For instance, they point out the following:

- Early in the arbitration proceedings, Knobel signed a settlement agreement incorporating the operating agreement's arbitration clause, though he later conceded that the settlement agreement was unenforceable.
- Knobel asserted claims under the settlement agreement and moved to enforce that agreement in the arbitration before later withdrawing the claims and the motion.
- Knobel sought to have Native Roots indemnify him for his attorney fees, and the arbitrator granted that request.

¶ 131 Ginsberg and Jordan don't develop their arguments on these points, and we don't see how any of the exceptions apply. For instance, Knobel's short-lived (and unsuccessful) pursuit of issues regarding a separate settlement agreement doesn't provide a basis for applying estoppel — a theory that would require a showing that Knobel knew the facts, Knobel intended his conduct to be acted upon or acted in such a way that Ginsberg and Jordan must've been ignorant of the true facts, and Ginsberg and Jordan reasonably relied on that conduct with resulting injury. *See Tarco, Inc. v. Conifer Metro. Dist.*, 2013 COA 60, ¶ 39. The fact that the settlement agreement incorporated the operating agreement's arbitration clause would've bound Knobel to arbitrate any claims arising out of that settlement agreement, but it didn't bind him to arbitrate claims arising out of the operating agreement to which he wasn't a party. And Knobel's successful claim for indemnification of his attorney fees merely reflects his entitlement to reimbursement of fees he was forced to spend when he was brought into the arbitration proceedings. Therefore, we decline to consider these arguments any further. *See Estate of Chavez*, ¶ 26.

¶ 132 Accordingly, we agree with the district court's conclusion that none of the other exceptions applies, and we affirm its ruling vacating the arbitration award against Knobel.

VII. Arbitrability of the Parties' Loan Dispute

¶ 133 We now turn to an issue the district court didn't resolve because of its decision to vacate the entire arbitration award on the basis of partiality — that is, whether the arbitrator properly exercised jurisdiction over a dispute concerning a loan transaction between Brightstar and Native Roots. We conclude that he did.

A. Additional Facts

¶ 134 One of the disputes the arbitrator resolved concerned an agreement under which Brightstar loaned $50 million to Native Roots, secured largely by a promissory note. Ginsberg and Jordan each pledged their membership interests as security for the loan.

¶ 135 As relevant here, the arbitration clause in the operating agreement provides that "[u]nless otherwise agreed in writing, any controversy, claim or dispute arising out of or relating to this [a]greement, shall be settled by binding arbitration." It also provides that any arbitration "shall be conducted in accordance with the then prevailing commercial arbitration rules of the [AAA]."

¶ 136 Neither the loan agreement nor the pledge agreements have any provision relating to the forum for disputes. But the note — which was executed by Brightstar and Native Roots — provides that "any claim arising out of this [n]ote or any other agreement to or for the benefit of [Brightstar or Native Roots] . . . irrevocably submits, for itself and its property, to the exclusive jurisdiction of the courts of Eagle County, Colorado."

¶ 137 In 2020, while the arbitration was pending, Brightstar declared Native Roots in default of the loan agreement on the basis that Native Roots was unable to pay its debts as they became due (a basis of default under the loan agreement). Brightstar accelerated the amount due on the loan and announced that it was seizing Ginsberg's and Jordan's membership interests pursuant to their pledge agreements.

¶ 138 Ginsberg and Jordan filed a motion in the arbitration for a temporary restraining order (TRO) and/or a preliminary injunction. The arbitrator initially granted the TRO and then later granted a preliminary injunction enjoining Native Roots, Brightstar, and Knobel from, among other things, declaring the loan in default or enforcing any remedies based on an alleged default. In doing so,

the arbitrator rejected Brightstar's argument that the loan dispute wasn't subject to arbitration under the operating agreement.

¶ 139 Shortly after the arbitrator entered the TRO, Brightstar filed a new case in Eagle County, along with a motion to stay the arbitration or enjoin any attempt to arbitrate the loan dispute. The district court in that case denied the motion, concluding that arbitration was appropriate.

¶ 140 Brightstar then filed a motion in Denver District Court to vacate the arbitrator's interim order granting the preliminary injunction. (This was the motion that initiated the underlying case and briefly referenced the CRUAA.) The district court denied the motion, noting that it wasn't clear whether it had jurisdiction over the arbitrator's nonfinal order but that, if it did, it agreed that the loan dispute was subject to arbitration.

¶ 141 In his merits award, the arbitrator found that Knobel had directed his own agent to prepare the declaration of default on Native Roots' behalf in a fraudulent effort to misappropriate Ginsberg's and Jordan's interests in Native Roots. The arbitrator accordingly declared the declaration of default and any actions

taken pursuant to it to be void, and he converted the preliminary injunction into a permanent injunction.

B. Standard of Review

¶ 142 Unlike Knobel, Brightstar is a member of Native Roots and is a signatory of its operating agreement. Brightstar therefore is bound by the arbitration terms in the operating agreement. Thus, in determining whether Brightstar clearly and unmistakably submitted questions of arbitrability to the arbitrator — and accordingly what review standard applies to the arbitrator's determination of arbitral jurisdiction over the loan dispute — we consider the terms of the operating agreement's arbitration clause. *See First Options*, 514 U.S. at 943-44.

¶ 143 If an agreement incorporates rules that empower an arbitrator to determine issues of arbitrability, that establishes clear and unmistakable evidence that the parties intended to delegate issues of arbitrability to the arbitrator. *Ahluwalia*, 226 P.3d at 1099. In a similar case, where an agreement's arbitration clause incorporated the AAA Commercial Arbitration Rules, a division of this court held that "by incorporating [those rules] into their agreement, the parties authorized the arbitrator to decide arbitrability issues." *Id.* Indeed,

every federal circuit to consider the issue has determined that incorporation of the AAA rules — which, as noted above, empower arbitrators to decide issues of arbitrability — constitutes clear and unmistakable evidence of an intent to delegate issues of arbitrability to the arbitrator. *See Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (summarizing cases).

¶ 144 Following these cases, we conclude that the operating agreement provides clear and unmistakable evidence of the parties' intent to submit questions of arbitrability to the arbitrator. We therefore review this issue under the same standards we would apply to any other matter the parties agreed to arbitrate. *See First Options*, 514 U.S. at 943; *Ahluwalia*, 226 P.3d at 1099.

C. Applicable Legal Standards

¶ 145 Again, the FAA provides limited bases for vacating an arbitration award. *See* 9 U.S.C. § 10; *Hall St. Assocs.*, 552 U.S. at 586. The only basis that might apply to this issue is that the arbitrator exceeded his powers. As previously explained, under this ground, so long as an arbitrator interpreted and applied the relevant agreement, the award cannot be vacated simply because

the arbitrator may have erred. *Oxford Health Plans*, 569 U.S. at 569; *Stolt-Nielsen*, 559 U.S. at 671.

D. Application

¶ 146 As before, the sole question before us is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Oxford Health Plans*, 569 U.S. at 569.

¶ 147 Plainly, the arbitrator did just that. He interpreted the operating agreement and concluded that the loan dispute was subject to its arbitration clause. Whether we agree or disagree with his interpretation is immaterial. The fact that he interpreted the operating agreement "suffices to show that the arbitrator did not 'exceed[] [his] powers.'" *Id.* at 570 (alteration in original) (quoting 9 U.S.C. § 10(a)(4)); *see also Beijing Shougang Mining Inv. Co. v. Mongolia*, 11 F.4th 144, 161 (2d Cir. 2021) (arbitrators didn't exceed their powers when they interpreted an agreement and determined the scope of their jurisdiction under it).

¶ 148 Accordingly, we conclude that the arbitrator properly exercised jurisdiction over the parties' loan dispute.

VIII. Appellate Attorney Fees and Costs

¶ 149 Finally, we consider Ginsberg's and Jordan's requests for an award of their appellate attorney fees and costs under the CRUAA, which allows a court to award reasonable attorney fees and costs to a party who prevails on a motion to confirm or vacate an arbitration award. § 13-22-225(2)-(3), C.R.S. 2023. Because we've determined that the FAA, rather than the CRUAA, applies to these proceedings, Ginsberg and Jordan aren't entitled to appellate attorney fees or costs under this provision. Accordingly, we deny their request.

IX. Disposition

¶ 150 The judgment is affirmed in part and reversed in part as follows:

- The ruling granting Knobel's motion to vacate the arbitration award entered against him is affirmed.
- The ruling granting Brightstar's motion to vacate the arbitration award entered against it is reversed.
- The ruling denying Ginsberg's and Jordan's motions to confirm the arbitration award is affirmed as it relates to the award against Knobel but is reversed as it relates to the award against Brightstar.

¶ 151 The case is remanded to the district court with instructions to reinstate the arbitration award against Brightstar and to enter judgment on that award.

JUDGE J. JONES and JUDGE HARRIS concur.