ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

In the Matter of: ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR, Prosecuting party, v. FIVE STAR AUTOMATIC FIRE PROTECTION LLC, Respondent.	ARB CASE NO. 2023-0051 ALJ CASE NO. 2019-DBA-00004 ALJ PATRICK M. ROSENOW

RESPONSE BRIEF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

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The Davis-Bacon Act ("DBA" or "Act") requires a covered contractor to pay prevailing wages to all laborers and mechanics performing covered work on covered contracts. The Act is intended to protect local wage standards, and requires covered contractors to pay at least the rates determined to be prevailing in the area. And where a union wage rate prevails, the union's collective bargaining agreement ("CBA") and practice regarding classification of that work is determinative.

In this case, three workers who helped install a sprinkler system at an Air Force base in New Mexico performed tasks that are understood, based on local union practice, to fall within the pipefitter classification, for which the union rate was the prevailing rate. However, the subcontractor that employed them, Five Star Automatic Fire Protection, LLC ("Five Star"), paid those workers as general laborers, apparently based on a non-localized concept of the types of tasks it believed should fall within the general laborer classification. Crucially, Five Star did not

inquire as to what was covered by the local union pipefitter classification, and here, the tasks performed by the workers fell within that classification. Thus, the Administrative Law Judge ("ALJ") correctly determined that the workers had been misclassified and that Five Star owed them back wages. Furthermore, the ALJ rightly decided that Five Star intentionally disregarded its obligations to the workers under the DBA by failing to inquire into local union practice, which warrants debarment. The ALJ's decision is correct and is well-supported by the evidence and the applicable law. Accordingly, the Administrative Review Board ("Board" or "ARB") should affirm that decision.

STATEMENT OF THE ISSUES

1. Whether the ALJ correctly concluded based on the evidence, including the job classifications from the Local 412 CBA and local area union practice, that the work at issue fell within the union pipefitter classification.
2. Whether the documentary evidence on which Five Star relies contradicts the testimony of Christopher and Miguel Garcia that they performed pipefitter work; whether the ALJ's credibility determinations were clearly erroneous; and whether Five Star has identified any other deficiency in the ALJ's decision that the workers were misclassified.
3. Whether the ALJ correctly determined that Five Star should be debarred.

STATEMENT OF THE CASE

A. The Davis-Bacon Act

The Davis–Bacon Act is "a minimum wage law designed for the benefit of construction workers, protecting local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1055 (D.C. Cir. 2007) (internal quotation marks and citations omitted). The DBA applies to

"every contract in excess of $2,000, to which the Federal Government . . . is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government." 40 U.S.C. 3142(a). Contractors and subcontractors on projects subject to the DBA must pay their workers certain prevailing wage rates determined by the Wage and Hour Division ("WHD") of the Department of Labor ("DOL" or "Department"). *See id.* 3142(a)–(c); 29 C.F.R. 1.6.

WHD issues wage determinations listing hourly wage rates and fringe benefits determined "to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work" in the applicable area, which are available to contractors preparing bids and which are incorporated into the relevant contracts. 40 U.S.C. 3142(b), (c); 29 C.F.R. 1.2, 1.3, and 5.5(a)(1). Contractors and subcontractors are responsible for paying their workers the appropriate wage rate and fringe benefits for the work performed and are not permitted to pay a lower apprentice rate to workers who are not enrolled in a bona fide apprenticeship program. 29 C.F.R. 5.5(a)(1) and (4). Contractors and subcontractors must keep accurate payroll records that sufficiently and accurately demonstrate that workers were paid prevailing wages and fringe benefits for all compensable work, 29 C.F.R. 5.5(a)(1)(i) and (a)(3)(i), and, on a weekly basis, must submit such records to the contracting agency accompanied by a signed statement of compliance, 29 C.F.R. 5.5(a)(3)(ii)(A) and (B).

B. Factual Background

In 2014, the United States Army Corps of Engineers contracted for a replacement medical clinic (the "Project") at Holloman Air Force Base in Otero County, New Mexico. Joint Pretrial Stipulations ¶ 5. The contract was awarded to prime contractor Gilbane Federal Joint Venture, LLC ("Gilbane"). *Id.* ¶ 6. On December 22, 2014, Gilbane entered into a subcontract

with Five Star for Five Star to furnish, install, and complete all fire protection systems for the Project. *Id.* ¶ 7. Both the prime contract and the subcontract were subject to the provisions of the DBA, its implementing regulations, and the applicable wage determination, Wage Decision No. NM140032, Building Construction Project, modification dated June 27, 2014 ("Wage Decision"), which was incorporated into the Contract and the Subcontract. *Id.* ¶ 9.

Five Star is a sprinkler installation business that was originally established in New Mexico in 2000 and then later formed as a limited liability company in Texas in 2004. *Id.* ¶ 8. Luis Palacios and his wife, Veronica Palacios, own Five Star; Luis Palacios is the president and managing member, and Veronica Palacios is the vice president. *Id.* Five Star's business office, headquarters, yard, and fabrication facility are located in El Paso, Texas. *Id.*

In October 2017, the WHD El Paso Field Office began an investigation of Five Star for DBA compliance on the Project. *Id.* ¶ 10. The WHD investigation covered the period of June 5, 2016 through August 13, 2017. *Id.* During the period at issue, Five Star assigned four employees to perform work on the Project: Adrian Cabral, Jesus "Chuy" Torres, Christopher Garcia, and Miguel Garcia. *Id.* ¶ 14. Five Star assigned Cabral, a journeyman sprinkler fitter, to be the foreman on the Project, and it assigned Torres and Christopher and Miguel Garcia ("the Garcias" or "the Garcia brothers") to assist Cabral. *Id.*

The Wage Decision, which concerns building construction in Otero County, New Mexico, contains a pipefitter classification, but does not include a sprinkler fitter classification. JX-12;[1] Joint Pretrial Stipulations ¶ 15. In issuing the Wage Decision, WHD determined that the local union rate prevailed as to the pipefitter wage rate, and hence the pipefitter job classification, as indicated by the identifier for the classification, PLUM0412-007. Joint Pretrial

[1] All trial exhibits are labeled "JX-_."

Stipulations ¶ 17. The local union whose wage rate prevailed was the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 412 ("Local 412"), a union of plumbers, pipefitters, sprinkler fitters, and service techs. *Id.* Local 412's CBA dated October 21, 2015, sets forth the wage rate and fringe benefits for the pipefitter classification listed in the Wage Decision. *Id.* The identifier listed in the Wage Decision for the common/general laborer job classification, SUNM2010-013, indicates that WHD derived this job classification and weighted average wage rate from survey data in New Mexico in 2010. *Id.* ¶ 19. The prevailing wage rate for this classification was not a union rate. *Id.*

Five Star classified and paid Cabral under the pipefitter job classification for all hours that Cabral worked on the Project. *Id.* ¶ 16. The prevailing wage rate for pipefitters listed in the Wage Decision is $31.14 per hour in wages and $12.43 per hour in fringe benefits. *Id.* Five Star classified and paid Torres and the Garcia brothers under the common/general laborer job classification for all hours that they worked on the Project. *Id.* ¶ 18. The prevailing wage rate for common laborers listed in the Wage Decision is $13.61 per hour in wages and $3.89 per hour in fringe benefits. *Id.* Torres worked for Five Star from July 30, 2015 to March 30, 2017. *Id.* ¶ 22. Christopher Garcia worked for Five Star from February 1, 2016 until May 2017. *Id.* ¶ 23. Miguel Garcia worked for Five Star from November 23, 2015 until May 2017. *Id.* ¶ 24.

Five Star enrolled the Garcias in its DOL-approved apprenticeship program on May 3, 2017. Joint Pretrial Stipulations ¶ 26; JX-10 at VP-2, VP-4. Although the Garcias worked on the Project for four more days, Five Star continued to classify them as laborers and did not adjust their wages. Joint Pretrial Stipulations ¶¶ 18, 26; JX-25 at DOL 7135, 7137. The adjusted apprenticeship wages, at 50% of the pipefitter classification, would have paid less than wages of

the laborer classification. See JX-31 at DOL 47–48. Five Star never enrolled Torres in the company's apprenticeship program. Joint Pretrial Stipulations ¶ 28; *see also* Tr. 529:5–9.

Luis Palacios made the decision on behalf of Five Star as to how to classify the work that Cabral, Torres, and the Garcia brothers performed on the Project. *Id.* ¶ 20. Five Star has three categories of sprinkler fitting employees, identified according to their skill and experience: laborers (also known as helpers)[2], supervisors (also known as journeyman sprinkler fitters), and apprentices *Id.* ¶ 25. Laborers are new hires who are inexperienced and work under the supervision of a foreman. *Id.* Five Star has a system for assigning laborers to foremen and attempts to assign one laborer to each foreman. *See* Tr. 63:6–10, 514:16–24, 677:2–14, 696:5–10. Laborers learn about the work that Five Star's apprentices and foremen do and perform certain tasks that apprentices also perform. Tr. 697:19–698:1. Foremen are responsible for teaching laborers the sprinkler fitting trade. Tr. 1231:20–1232:3. Five Star claims that after about a year, laborers are eligible to become apprentices under Five Star's formal, DOL-approved apprenticeship program. Joint Pretrial Stipulations ¶ 25. Apprentices become foremen after completing the apprenticeship program, which takes approximately two to four years. *Id.*

Five Star has always worked on some type of DBA or other prevailing wage project. Tr. 643:20–24, 646:15–19. According to Luis Palacios, Five Star installed fire protection systems on "a lot" of DBA jobs, "hundreds maybe," before the Holloman AFB Project. Tr. 643:13–16. In addition to this work, Five Star's management had other relevant experience with DBA projects.

[2] At times, Five Star's own description of the workers as helpers suggests that it recognizes that Torres and the Garcias were performing lower-skilled tasks within the pipefitter journeyman classification. When this occurs, the DBA regulations make it clear that the workers must be classified and paid as journeymen. *See* 29 C.F.R. 5.5(a)(1) (workers "must be paid the appropriate wage rate and fringe benefits on the wage determination for the classification(s) of work actually performed, without regard to skill"); *id*. at 5.2(n)(4) (delineating the extremely narrow circumstances, not present here, under which a helper classification may be included in a wage determination). Accordingly, Five Star's own arguments show that it believes Torres and the Garcias were performing a less-skilled version of the pipefitter journeyman duties.

For example, vice president Veronica Palacios attended a DOL seminar that covered the DBA, and president Luis Palacios worked as a supervisor on a number of DBA projects prior to forming Five Star. Tr. 1042:6–1044:13, 1073:25–1074:6, 1243:22–24, 1246:15–25, 1247:19–23, 1248:18–1249:24; *see also* Tr. 1331:21–1332:7. This included three years working for Western States Fire Protection ("Western States") as a foreman and project manager, where Luis Palacios was in charge of DBA-covered projects and responsible for overseeing compliance with the Act. Tr. 653:21–23, 654:5–8, 1248:18–24, 1249:2–24. Prior to working for Western States, Luis Palacios also had responsibility for ensuring compliance with the DBA as a foreman for Sun City Fire Protection. Tr. 1243:22–24, 1247:15–23. Additionally, Luis Palacios has attended at least one conference discussing the DBA as a member of the El Paso Association of Contractors. Tr. 1260:14–1261:5.

Luis Palacios also has relevant experience working with unions, understanding the provisions of their CBAs, and the application of those CBAs to DBA-covered projects. In 1999, while working for Western States, Luis Palacios became a member of Road Sprinkler Fitters Local Union 669 ("Local 669"), a sprinkler fitting union. Tr. 652:1–4, 653:8–11; *see also* JX-14 at DOL 1111 and 1116. As a Local 669 union shop, Western States gave employees access to the union's CBA, and Luis Palacios was familiar with its terms. Tr. 653:24–654:4, 655:15–18. Specifically, Luis Palacios knew the types of work covered by the CBA's jurisdiction of work provision. *See* Tr. 655:15–656:1, 1374:6–12. Luis Palacios also knew that the Local 669 CBA identified its members' employees who were learning the sprinkler fitting trade as apprentices. Tr. 675:8–11. Further, Luis Palacios knew that Western States only assigned apprentices or journeymen sprinkler fitters to its projects and paid them according to the Local 669 CBA, even on DBA-covered projects. Tr. 783:3–7; *see also* Tr. 779:13–16. The only employees that Luis

Palacios knew Western States paid as laborers were shop laborers and an employee who picked up and delivered material on jobs. Tr. 674:4–675:7; *see also* JX-29 ¶ 57; Tr. 735:22–736:12. Also through his work at Western States, Luis Palacios became familiar with Local 412, a pipefitting and plumbing union. Tr. 662:20–21; *see also* JX-13 at DOL 1049–50. Palacios sometimes supervised members of Local 412 working as sprinkler fitters on behalf of Western States when the company needed additional manpower. Tr. 662:22–664:1. He was aware that Local 412 had a CBA for its members. Tr. 1354:2–5.

Torres and the Garcias performed the following tasks on the Holloman AFB Project: unloading, carrying, and organizing pipes and materials;[3] using blueprints or plans;[4] preparing and installing hangers;[5] installing pipe;[6] using a power machine;[7] cutting pipe;[8] grooving pipe;[9]

[3] JX-30 ¶ 15; Tr. 42:17–20, 48:5–10, 49:20–50:10, 55:9–23, 66:6–13, 66:17–67:1, 67:5–16, 68:12–24, 70:25–71:10, 73:6–17, 91:15–18, 91:23–92:12, 93:15–17, 163:4–10, 164:24–165:5, 168:21–170:15, 214:4–19, 215:19–216:2, 217:7–21, 222:2–12, 249:4–7, 250:2–9, 267:21–268:2, 268:14–18, 293:11–16, 293:20–25, 302:19–21, 428:5–22, 478:10–16, 479:19–480:11, 520:22–521:6, 534:16–535:7, 535:17–22, 536:17–537:2, 546:3–14, 546:25–547:3, 549:1–9, 575:19–576:9, 577:22–580:7, 1152:21–1153:13, 1161:18–1162:7, 1212:4–11, 1214:14–20, 1219:19–1220:11, 1231:6–12, 1222:9–16; *see also* Tr. 1222:9–12. "Lay out" means organizing pipe so that it is ready to be installed. Tr. 48:11–13.

[4] Tr. 70:25–71:10, 91:19–22, 170:9–171:15, 221:7–222:20, 225:16–226:5, 269:2–5, 419:3–12, 428:10–15, 520:22–521:6, 544:1–16, 577:9–14, 1219:4–9. Plans, blueprints, and drawings are the same thing. Tr. 170:16–18, 1368:20-22; *see also* Tr. 200:8–12.

[5] JX-30 ¶ 15; Tr. 83:4–84:4, 152:12–18, 160:13–23, 204:25–206:14, 208:7–209:3, 222:11–20, 273:9–12, 311:6–22, 429:22–430:19, 433:21–434:24, 483:14–16, 520:22–521:6, 546:3–14, 546:25–547:3, 549:10–550:16, 1112:19–1115:15, 1131:19–1132:14; *see also* Tr. 172:3–7, 179:7–11 (Christopher Garcia referring to diagram of hanger and describing adjustments he made to hangers).

[6] Tr. 84:19–85:1, 125:23–126:6, 127:2–5, 127:12–17, 152:12–18, 163:4–164:6, 170:9–15, 172:20–25, 175:21–176:1, 181:4–11, 218:13–219:3, 219:16–22, 222:11–223:1, 225:4–15, 234:12–14, 245:16–246:20, 412:12–17, 418:9–25, 420:18–421:7, 427:16–24, 430:20–431:3, 432:21–433:20, 437:22–439:3, 446:21–447:7, 461:8–462:9, 471:9–17, 472:22–473:2, 480:8–11, 492:13–15, 498:12–15, 521:11–17, 533:16–543:3, 534:4–9, 540:3–20, 542:5–12, 543:22–25, 545:7–547:9, 548:17–25, 562:1–10, 563:15–23, 581:22–582:9, 582:14–23, 625:9–20, 1131:19–1132:14, 1135:10–25, 1219:4–9; *see also* Tr. 172:3–7.

[7] Tr. 167:11–168:14, 177:3–18, 422:11–18, 538:2–539:12, 585:12–22. A RIGID 300 is a power machine. Tr. 1229:14–17.

[8] Tr. 158:5–9, 161:15–162:8, 197:14–198:1, 217:22–218:17, 219:9–22, 220:23–221:6, 239:23–240:17, 418:9–15, 422:11–18, 422:25–423:19, 426:6–427:1, 427:16–24, 433:21–434:24, 539:25–540:12, 539:17–23, 551:18–552:8; *see also* Tr. 447:8–13.

[9] Tr. 157:19–158:4, 217:22–218:17, 219:9–22, 418:9–15, 426:20–427:11, 427:16–24, 490:3–491:2, 539:25–540:12, 539:17–23; *see also* Tr. 161:15–24, 167:21–168:14.

threading pipe;[10] installing brackets for sprinkler heads;[11] installing sprinkler heads;[12] hydrostatic testing;[13] caulking;[14] installing escutcheons;[15] and cleaning and sweeping to some extent.[16]

The applicable Local 412 CBA describes the union's geographical jurisdiction as "the entire State of New Mexico and also to any additional area over which jurisdiction is assigned to Local Union No. 412 by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada." JX-13 at DOL 1050, Article II.

The applicable Local 412 CBA also describes the union's trade jurisdiction in relevant part as:

> **[Covering] the rates of pay, hours and working conditions of all Employees engaged in the installation of all plumbing and/or pipe fitting systems and component parts thereof,** including fabrication, **assembling**, erection, **installation, testing**, balancing, dismantling, repairing, reconditioning, **adjusting**, **altering**, servicing, **handling, unloading**, distributing, **tying on and hoisting of all piping materials, by any method, including all hangers** and supports of every description and all other work included in the current Constitution of the United Association.
>
> …
>
> Equipment used on building and construction work in conjunction with the work of the trade, as a time and labor saving device, shall be operated by an Employees covered by this Agreement.

[10] Tr. 155:17–21, 177:3–18, 217:22–218:17, 426:6–19, 427:16–24, 433:21–434:24, 490:3–14, 548:22–25; *see also* Tr. 447:8–13.
[11] Tr. 90:23–24, 216:7–19, 482:7–483:9, 484:23–485:6; *see also* Tr. 551:2–13.
[12] Tr. 88:21–25, 106:9–15, 156:18–157:1, 258:20–23, 416:7–16, 416:21–417:1, 417:25–418:5, 433:21–434:24, 446:21–447:7, 482:7–483:9, 484:23–485:6, 498:12–15, 533:16–534:3, 551:18–20, 552:9–20, 563:3–5, 563:15–23, 1219:16–18; *see also* Tr. 1146:7–19.
[13] Tr. 284:4–13, 404:14–407:13, 417:25–418:8, 435:22–436:24, 454:25–457:3, 533:16–543:3, 554:5–556:2, 563:15–23, 595:7–596:5, 596:23–597:3. Hydrostatic testing involves pressurizing the fire sprinkler system with water for at least two hours and checking for leaks. Tr. 553:23–554:13. This testing sometimes is called "pressure testing" or "hydrotesting." Tr. 435:22–24.
[14] JX-30 ¶ 15; Tr. 89:11–18, 94:8–10, 106:9–15, 152:24–153:11, 216:24–217:1, 234:2–11, 234:15–18, 253:13–16, 254:4–25, 268:3–8, 299:9–21, 436:25–437:15, 556:5–7, 556:22–557:3, 1214:21–1215:1; *see also* 591:8–15. Five Star employees applied caulk with a caulking gun. Tr. 94:11–21, 1229:11–13.
[15] Tr. 85:2–5, 105:21–22, 251:25–252:12, 274:8–13, 274:16–18, 416:7–16, 417:25–418:5, 480:16–481:4, 481:20–482:6; 553:2–8.
[16] JX-30 ¶ 15; Tr. 88:9–16, 89:5–9, 189:10–190:3, 296:23–297:11, 447:8–20, 483:17–484:2, 488:3–5; 597:4–19, 1116:7–11, 1212:4–11.

…

> The operation of pumps, air compressor and welding machines, when used in conjunction with work covered by this agreement, shall be done by any Employees covered by this Agreement. The testing and balancing of all plumbing and pipefitting systems or component parts[] thereof, shall be done by any Employees covered by this Agreement.

JX-13 at DOL 1050-1051, Article III (emphasis added).

Courtenay Eichhorst is Local 412's business manager for all of New Mexico and much of West Texas. Tr. 812:17-21, 813:24-814:1. He has been a member of Local 412 for at least 21 years, and since joining the union worked as a pipefitter apprentice, journeyman, foreman, general foreman, superintendent, and training coordinator before assuming his current position. Tr. 814:2–3, 814:20–815:2, 815:17–20, 816:5–7, 816:21–817:2, 818:10–12. Eichhorst is familiar with the different tasks that pipefitters perform under the Local 412 CBA. Tr. 835:14–22. Eichhorst stated that Local 412's members and contractors perform the following tasks: unloading, carrying, and organizing pipes and materials; using blueprints or plans; preparing and installing hangers; installing pipe; using a power machine; cutting pipe; grooving pipe; threading pipe; installing brackets for sprinkler heads; installing sprinkler heads; hydrostatic testing; caulking; installing escutcheons; and cleaning.[17] At trial, Luis Palacios affirmed his prior declaration listing tasks that he believed Torres and the Garcias performed. JX-29 ¶¶ 85–86; Tr. 754:22–755:1, 755:18–758:21, 1337:6–19, 1343:11–15, 1376:11–15; *see also* Tr. 744:21–745:4. Eichhorst testified that the Local 412 CBA claims trade jurisdiction over each one of these tasks. *Compare* JX-29 ¶¶ 85–86; Tr. 754:22–755:1, 755:18–758:21, 1337:6–19, 1376:11–15 *to* Tr. 854:19–856:7.

[17] *See, e.g.*, Tr. 840:20–841:9, 847:1–3, 7–9, 13–15, 848:7–15, 849:7–12, 855:4–7, 8–10.

The trade jurisdiction of the Local 412 CBA identifies tasks that pipefitters perform, including sprinkler fitting tasks in the installation of fire protection systems. This trade jurisdiction is limited to apprentices and journeymen but is not limited by whether apprentices or journeymen perform the task alone or assist in performing the task. Tr. 839:25–840:19, 858:1–19. Eichhorst testified that he has never heard of any Local 412 members who assisted in or performed any sprinkler fitting or pipefitting tasks being classified as laborers. Tr. 859:16–22. Nor has he heard of any Local 412 members or contractors using laborers to assist them in any sprinkler fitting or pipefitting tasks, including loading or unloading material or pipe. Tr. 865:23–866:10.

Eichhorst is familiar with the tasks that laborers perform in New Mexico. Tr. 830:14–16. Specifically, Eichhorst is the president of New Mexico Building Trades Council, a group of fifteen local unions that share ideas and information and help one another with manpower needs and collective bargaining. Tr. 828:3–10, 16–18. Additionally, in his 21 years working in the pipefitting trade, Eichhorst has observed that laborers perform unskilled tasks, such as raking, shoveling, and janitorial-type work. Tr. 863:20–864:11. In his experience, laborers do not assist with the installation of any fire sprinkler or pipefitting pipe systems, and they never touch pipe nor the tools or materials used to install pipe. Tr. 864:12–20. Eichhorst acknowledged that the applicable Local 412 CBA has a section referencing utility workers. JX-13 at DOL 1061–62. Under the CBA, utility workers can perform basic tasks, including handling some materials and performing fire watch; however, as Eichhorst explained, utility workers cannot assist or have any significant role in pipe installation, including handling tools or equipment used to install pipe or operating equipment to facilitate pipe installation. Tr. 868:4–869:1. Section 10.4 of the CBA requires Local 412 contractors to get prior authorization to use utility workers. JX-13 at DOL Tr.

867:1–4, 13–15. To Eichhorst's knowledge, Local 412 members and contractors have never used utility workers on DBA jobs because the DOL wage determinations do not contain a utility worker classification. *See* Tr. 870:17–871:9.

The Administrator also introduced evidence concerning the applicable Local 669 CBA, which provides additional information concerning prevailing practices for sprinkler fitters in New Mexico. *See* JX-14 at DOL 1117–1118; Tr. 338:3–9, 347:24–348:7. The Local 669 CBA describes the union's jurisdiction of work as including the following: "[t]he work of the Sprinkler Fitter and/or Apprentice shall consist of the installation, . . . adjustments, and corrections of all fire protection and fire control systems including the unloading, handling by hand, power equipment and installation of all piping or tubing, appurtenances and equipment pertaining thereto . . . ." JX-14 at DOL 1138–39. And Addendum A to the CBA further explains that the jurisdiction of work includes "all piping for sprinkler work of every description," "[a]ll fire extinguishing systems and piping," "[l]aying out, cutting, bending and fabricating of all pipe work of every description, by whatever mode or method," and "[t]he handling and using of all tools and equipment that may be necessary for the erection and installation of all work and material used in the pipe fitting industry." JX-14 at DOL 1159–62.

Rita Neiderheiser is a Technical Advisor for Local 669. Tr. 321:1–4. She has been a member of Local 669 since 1978, and has worked as sprinkler fitter apprentice, journeyman, foreman, business owner, and teacher before assuming her current position. Tr. 322:12–323:2, 323:22–324:12, 326:10–14, 327:14–22, 332:5–18, 333:18–22. She also worked for Western States, a Local 669 contractor. Tr. 323:25–324:9. Neiderheiser worked primarily in Colorado, but she spoke with other employees working in New Mexico about their job and worked in New Mexico for a short period. Tr. 326:19–327:13, 340:18–21, 341:9–13, 377:7–13, 386:4–6. From

that experience, Neiderheiser understood that the work of sprinkler fitters in New Mexico was the same as the work of sprinkler fitters in Colorado, and that the practices of Local 669's sprinkler fitters are similar from state to state. *Id.*; Tr. 324:8–9, 348:24–349:7. According to Neiderheiser, the Local 669 CBA covers the following tasks: unloading pipe, carrying, and organizing pipe and materials; using blueprints or plans; preparing and installing hangers; installing pipe; using a power machine; cutting pipe; grooving pipe; threading pipe; installing brackets for sprinkler heads; installing sprinkler heads; hydrostatic testing; caulking; installing escutcheons; and maintaining a clean job site to prevent tripping hazards.[18]

Wage Hour Investigator ("WHI") Gutberto Martinez prepared back wage computations for Torres and the Garcias based on his determination that each of them should have been classified as a pipefitter and paid the prevailing wage rate for that classification. *See* JX-31 (entitled "Wage Transcription and Computation Sheet"); Tr. 907:19–908:4, 929:6–14. WHI Martinez calculated the back wages owed for each employee based on the difference between the pipefitter rate and the general laborer rate on the Wage Decision for each hour they performed work on the project: $42,181.26 for Torres; $15,477.60 for Christopher Garcia; and $13,626.63 for Miguel Garcia, for a total of $71,285.49 owed by Five Star. JX-22.

C. Procedural Background

In October 2017, the Administrator began investigating Five Star's compliance with the DBA on the Holloman AFB project for the time period of June 5, 2016 through August 13, 2017. ALJ Decision & Order ("ALJ Decision") 2. On August 1, 2018, the Administrator issued a Notice of Determination, finding that Five Star misclassified the work that Torres and the Garcia brothers performed on the project and that it owed $71,285.49 in back wages, and holding that it

[18] *See, e.g.*, Tr. 349:8–352:17, 352:20–353:17, 355:7–357:6, 357:17–22, 357:25–358:4, 364:10–13.

would be subject to debarment. JX-1. On August 30, 2018, Five Star objected to the Administrator's determination and requested a hearing. ALJ Decision 2. On June 13, 2019, the Administrator filed an Order of Reference, and the case was referred to the Office of Administrative Law Judges. *Id.* The parties engaged in discovery, and the Administrator filed a Motion for Summary Decision, which was denied. *Id.* The COVID-19 pandemic caused some delays in the case. *Id.* ALJ Patrick M. Rosenow held a hearing that took place over several days in February and April 2021. *Id.*

On August 4, 2023, the ALJ issued a decision in the Administrator's favor. ALJ Decision 16–18. The ALJ determined that the work that Torres and the Garcias performed should have been compensated at the pipefitter rate, not the laborer rate. *Id.* at 16. The ALJ explained that there was "no real dispute" that Torres and the Garcias did tasks that fell within the pipefitter classification, as they:

> unloaded pipes and other materials and placed them based on the numbering system as set forth in the blueprints; screwed escutcheons into the ceiling holes; used caulking guns to seal spaces; held pipes while Cabral installed, hung, or re-cut or re-grooved them; climbed ladders and secured a metal bar with a screw; placed hangers on a beam and tightened bolts; and installed brackets and secured sprinkler heads by hand and snapped together flex heads.

Id. The ALJ rejected Five Star's argument that these tasks should be compensated at the laborer rate because they did not require specialized skills or talent, finding that "the CBA/wage determination gives notice that employees who perform those tasks must be paid at the pipefitter rate," and "given the wide scope of the CBA/wage determination, virtually all of [Torres and the Garcias'] work fell into the pipefitter category," rendering any question of apportionment moot. *Id.* The ALJ also determined that the Administrator's calculations of underpayment of wages were "reasonable in fact and in law" and thus adopted them. *Id.*

Lastly, the ALJ determined that debarment was appropriate. ALJ Decision 18. He found that "[t]he most relevant and probative facts" with regard to debarment were "(1) [Five Star]'s preexisting familiarity with the DBA, (2) [Torres and the Garcias'] signing into work with the incorrect classification, and (3) Cabral's instruction to [Torres and the Garcias] to drop their questions about their pay rate." *Id.* The ALJ explained that "[t]hose facts establish at least gross negligence or willful blindness and justify debarment." *Id.*

SUMMARY OF ARGUMENT

The ALJ correctly decided that Five Star misclassified the work of Torres and the Garcias on the project, and that Five Star's actions constituted the type of disregard of the DBA's requirements that warrants debarment. Many of Five Star's arguments on appeal reflect the company's apparent lack of understanding of certain fundamental DBA principles. For instance, Five Star repeatedly objects to the ALJ's consideration of the pipefitter classification in the Local 412 CBA, as well as the union business agents' testimony concerning union practice, but because the union rate prevailed for the pipefitter classification on the Wage Decision, the ALJ was *required* to consider the local union's practice for that classification. Five Star also attempts to argue that the documentary evidence definitively proves its case, but that evidence often does not show what Five Star asserts. Further, many of Five Star's arguments concerning the evidence boil down to an assertion that the ALJ should have credited their favored evidence (or favored interpretation) instead of other evidence, but the ALJ's credibility determinations were thoughtful and well-supported, and Five Star has not shown that they were erroneous. Additionally, in several instances, Five Star advocates for application of an incorrect standard, including a "tools of the trade" analysis and the prior debarment standard applicable under the Davis-Bacon Related Acts, which was more stringent than that of the DBA. But the ALJ applied

the correct standards in all respects. And when the correct standards are applied, it is clear that Five Star misclassified the work of Torres and the Garcias, and its actions satisfy the standard for debarment under the DBA. Accordingly, the ALJ's decision should be affirmed.

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear and decide appeals from ALJ decisions and orders concerning questions of law and fact arising under the DBA. *See* 29 C.F.R. 5.1, 6.34, and 7.1(d); *see also* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have had in making the initial decision except as it may limit the issues on notice or by rule."). The Board is "an essentially appellate agency." 29 C.F.R. 7.1(e). Absent clear error, the Board will generally defer to an ALJ's factual findings, especially those "predicated upon the ALJ's weighing and determining credibility of conflicting witness testimony." *Interstate Rock Prods., Inc.*, ARB No. 15-024, 2016 WL 5868562, at *7 (ARB Sept. 27, 2016) ("[I]t must be remembered that the ALJ heard and observed the witnesses during the hearing. It is for the trial judge to make determinations of credibility . . . ." (internal citations omitted)); *accord Sundex, Ltd.*, ARB No. 98-130, 1999 WL 1277545, at *4 (ARB Dec. 30, 1999) (*quoting Homer L. Dunn Decorating, Inc.*, WAB No. 87-03, 1989 WL 407460, at *2 (WAB Mar. 10, 1989)); *Fontaine Bros., Inc.*, ARB No. 96-162, 1997 WL 578333, at *3 (ARB Sept. 16, 1997) ("We defer to an ALJ's determination that a violation is willful unless the ALJ's findings are clearly erroneous." (*citing LTG Constr. Co.*, WAB No. 93-15, 1994 WL 764105, at *6 (WAB Dec. 30, 1994))). "Though the Board 'will not hear matters de novo except upon a showing of extraordinary circumstances,' the Board does decide questions of law de novo. It also 'may remand under appropriate instructions any case for the taking of additional evidence and the

making of new or modified findings by reason of the additional evidence.'" *Coleman Constr. Co.*, ARB No. 15-002, 2016 WL 4238468, at *5 (ARB June 8, 2016) (*quoting* 29 C.F.R. 7.1).

ARGUMENT

I. THE ALJ CORRECTLY CONSIDERED THE CBA AND PRACTICES OF LOCAL AREA UNIONS.

The ALJ correctly determined that the three workers at issue here were required to be classified as pipefitters and to be paid the prevailing wage rate for the pipefitter classification based on the applicable job classification contained in the Local 412 CBA. For decades, ARB and federal caselaw have clearly established that the proper classification for work performed by laborers or mechanics is the classification used by contractors whose wage rates the WHD determined to be prevailing in the area and incorporated into the wage determination. *See, e.g., Fry Bros. Corp.*, WAB No. 76-06, 1977 WL 24823, at *6 (WAB June 14, 1977*), aff'd, Fry Bros. Corp. v. Dep't of Hous. & Urb. Dev.*, 614 F.2d 732, 734 (10th Cir. 1980). As a federal district court explained, "Davis-Bacon wage determinations list only job classifications and their corresponding minimum wage and fringe benefit rates; they do not contain job descriptions." *Abhe & Svoboda, Inc. v. Chao*, No. CIV.A. 04-1973 (JR), 2006 WL 2474202, at *1 (D.D.C. Aug. 25, 2006), *aff'd, Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1058 (D.C. Cir. 2007). Thus, "*Fry Brothers* stated that the job content-or task lists-for classifications in Davis-Bacon wage determinations must be based on locally prevailing practices, and that, where union rates prevail, the proper classification of duties under the wage determination is established by the area practice of union contractors signatory to the relevant collective bargaining agreement." *Id.*; *see also Abhe & Svoboda*, 508 F.3d at 1058 ("Where collective bargaining agreements form the basis of wage determinations, the practice of local signatory unions is conclusive under Department precedent.").

Likewise, the Ninth Circuit explained that "where the Department determines that prevailing wages are established by a collectively bargained agreement, the job classifications for the project or area at issue are also established by that agreement." *U.S. ex rel. Plumbers & Steamfitters Loc. Union No. 38 v. C.W. Roen Const. Co.*, 183 F.3d 1088, 1093 (9th Cir. 1999) (citing *Fry Bros.*, 1977 WL 24823, at *6). The ARB (and its predecessor, the Wage Appeals Board (WAB)) have applied this principle consistently for decades. *See Trataros Constr. Corp.*, WAB No. 92-03, 1993 WL 306698, at *4 (WAB Apr. 28, 1993) ("[A] contractor is . . . obliged under a wage determination based upon collectively bargained wage rates to use the classifications of work used by contractors who are signatory to collective bargaining agreements."); *More Drywall, Inc.*, WAB No. 90-20, 1991 WL 494732, at *2 (WAB Apr. 29, 1991) ("[W]here as here, the applicable wage determination reflects the wage rates negotiated in collective bargaining agreements, the Board's decision in *Fry Brothers* states that the practices by contractors signatory to those agreements are to be followed on the project."). *See also* WHD Field Operations Handbook § 15f05(b) (2016), *available at* http://www.dol.gov/whd/FOH/FOH_Ch15.pdf ("The Wage Appeals Board ruled in *Fry Brothers* . . . that the proper classification of work performed by laborers and mechanics is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination.").

The *Fry Brothers* decision went on to explain why this principle is so crucial to enforcement of the DBA's protections:

> If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act. . . . Such a contractor could change

> his own practice according to what he believed each employee was worth for the work he was doing.

Fry Brothers, 1977 WL 24823, at *6; *see also Abhe & Svoboda*, 2006 WL 2474202, at *1–2 (same, quoting *Fry Brothers*). And the Ninth Circuit has explained that this principle is not only "eminently reasonable," but also necessary to prevent the "evisceration of Davis–Bacon" that would otherwise occur. *C.W. Roen Const. Co.*, 183 F.3d at 1093–94 (citing *Fry Brothers*).

Accordingly, it is well-established that where union rates are determined to be prevailing in a particular area, the union job classifications must be applied. Five Star argues that the Administrator's use of the job classifications from the Local 412 CBA was incorrect, because it claims that the union would have had to appeal the applicable wage determination within a timely manner after the determination was issued in order for the union job classifications to apply. Opening Br. of Resp't Five Star Automatic Fire Prot., LLC ("Resp't's Br.") 19–27. These arguments simply lack any merit.[19] Five Star has not attempted to explain why the well-established *Fry Brothers* principle is not applicable here, nor could it, because there is no basis not to apply the rule. Instead, Five Star argues that the inclusion of a general laborer category in the wage determination somehow created an ambiguity that the union was required to appeal and the Administrator was required to resolve. Resp't's Br. 19–27. That contention is unavailing, as the wage determination is not ambiguous. The determination covers all building construction projects in Otero County, New Mexico. JX-12. It encompasses categories of labor including carpenters, electricians, and bricklayers, in addition to the pipefitter classification. *Id.* Applying

[19] An appeal of a wage determination may be appropriate where an interested party is challenging the presence of a particular classification on a wage determination. *See, e.g.*, 29 C.F.R. 7.5. But that is not the case here: the classification of general laborer is found on most DBA wage determinations, and neither the union nor the Administrator has ever had any reason to contend that *no* work on *any* building construction project in Otero County could involve the use of general laborers. Rather, the key issue here is that the work by Torres and the Garcia brothers did not fall within the common laborer classification. This does not reflect an ambiguity or infirmity in the Wage Decision itself; rather, when the work at issue is classified in accordance with the Wage Decision, the work plainly falls within the scope of the pipefitter classification, as the ALJ concluded.

the *Fry Brothers* principle, the determination of whether the work performed by Torres and the Garcias fell into the pipefitter classification must be made by considering the pipefitter job description found in the CBA and union practice, because the union rate prevailed for the pipefitter classification. And given the work performed, there is no ambiguity regarding how to determine, under the Wage Decision, whether the work fell into the pipefitter classification.

Five Star also argues, for the first time on appeal, that the CBA introduced into evidence is not applicable, and because the earlier CBA was not put into evidence, the ALJ was required to infer that the earlier CBA contained a general laborer classification. Resp't's Br. 22. Five Star is attempting to reverse the position it took before the ALJ, where it agreed that the 2015 CBA is applicable to this case. *See* Resp't's Proposed Conclusions of Law ¶ 4 ("The date of the applicable collective bargaining agreement for Local 412 was October 21, 2015." (Citing JX-13)). The Administrator has been unable able to locate any instance in which Five Star objected to the admission of the 2015 CBA or argued that it was not applicable to this case. Thus, the Board should not allow Five Star to reverse its position on this issue in this appeal. Additionally, because Five Star did not make this argument to the ALJ, the argument has been waived. *See, e.g., Hood v. R&M Pro Transport, LLC*, ARB No. 15-010, 2015 WL 10001628, at *4 (ARB Dec. 4, 2015) (argument not raised before ALJ is waived on appeal); *Fredrickson v. the Home Depot U.S.A., Inc.*, ARB No. 07-100, 2010 WL 2158225, at *7 (ARB May 27, 2010) (same).

Furthermore, even if Five Star were permitted to reverse positions and advance this new argument on appeal, it is unavailing. The CBA was far from the only evidence that the Administrator introduced to show that the applicable union practice in the area excluded a general laborer category. To the contrary, the Administrator submitted ample evidence pertaining to local union practice in addition to the Local 412 CBA. All of this evidence supports the ALJ's

determination that the union job classifications did not allow for a general laborer category. First, Eichhorst, Local 412's business manager, testified that he had "never" seen Local 412 members being paid as laborers, rather than as pipefitter journeymen or apprentices. Tr. 858:13–19, 859:16–860:18. Eichhorst also stated that since 1999, when he became a member of Local 412, he had never heard of a Local 412 member being paid as a laborer. Tr. 861:10–16. And he further stated that he had never heard of laborers assisting Local 412 members in any of the tasks they perform. Tr. 866:7–10. These broad statements encompass the time period (2013–14) during which Five Star contends an earlier CBA was in effect. In addition, the Administrator introduced the Local 669 CBA to demonstrate prevailing practices for sprinkler fitters in New Mexico; that CBA also does not recognize a laborer job classification. JX-14. Furthermore, Neiderheiser, Local 669's Technical Advisor, testified that "[t]here is no such thing as a sprinkler fitter laborer," and that she had never seen a laborer performing sprinkler fitter duties, handling any sprinkler fitter's tools or equipment, or assisting a sprinkler fitter in doing their job. Tr. 367:11–368:12. Therefore, even if Five Star could successfully argue, for the first time on appeal, that the 2015 Local 412 CBA is irrelevant, that would not warrant an inference that an earlier version of the CBA included a general laborer category. The remaining evidence produced by the Administrator supports the ALJ's determination that the CBA did not permit workers doing the tasks that Torres and the Garcias did to be categorized as general laborers.

Finally, it is worth noting that as long as Torres and the Garcias performed tasks that fell within the pipefitter classification, this means that all of the work they did on the Project must be paid at the pipefitter wage rate. The DBA regulations require contractors to classify and pay employees according to the work they actually perform, without regard to the level of skill or experience required (unless they are registered in a DOL-approved apprenticeship program). 29

C.F.R. 5.5(a)(1)(i). A contractor may not divide, classify, or grade work customarily considered the work of a particular job classification, based on the contractor's assessment of his employee's skill. *Fry Bros.*, 1977 WL 24823 at *6 (contractor misclassified as "laborers" or "carpenter laborers" workers who performed duties within the scope of the union carpenter classification on the wage determination; employer not permitted "to divide work customarily considered to be the work of the carpenters' craft into several parts" based on the employer's assessment of the employees' skill, *regardless* of the common practice among non-union contractors *or* the existence of a common laborer classification on the wage determination). And here, the ALJ explained that there was "no real dispute" that Torres and the Garcias performed tasks including unloading pipes and placing them according to the blueprints, screwing escutcheons into the ceiling holes, holding pipes while Cabral installed, hung, or re-cut or re-grooved them, and installed brackets and secured sprinkler heads by hand and snapped together flex heads. ALJ Decision 15–16.[20] Accordingly, because Torres and the Garcias indisputably performed several tasks that fell squarely within the pipefitter classification, under the DBA, they were required to be paid the pipefitter wage for all of their work on the Project.

II. THE DOCUMENTARY EVIDENCE DOES NOT CONTRADICT THE GARCIAS' TESTIMONY, AND FURTHER, THE ALJ MADE PERMISSIBLE CREDIBILITY DETERMINATIONS.

Five Star argues that documentary evidence contradicts the Garcias' testimony about the work they performed, and thus, the ALJ erred by crediting the Garcias instead of this documentary evidence. Resp't's Br. 27–32. Five Star goes on to make additional arguments as to

[20] It does not appear that Five Star is arguing that the amount of time that Torres and the Garcias spent on pipefitter tasks is so low that they should still be compensated at the general laborer rate; indeed, even by Five Star's own *post hoc* calculations (which the Administrator does not concede are correct), Torres and the Garcias spent a significant amount of time on tasks such as unloading, moving, and organizing pipes, installing escutcheons, and assisting in the installation of hangers. Resp't's Br. 14.

why it believes the ALJ should not have credited the Garcias' testimony. *Id.* at 31–32. However, at most points, the objective evidence simply does not support the arguments that Five Star advances in its brief. At bottom, Five Star's arguments mostly amount to a belief that the ALJ should have found the testimony of its witnesses more credible than that of the other witnesses or contradictory evidence. But that is simply not a basis to overturn the ALJ's decision.

First, Five Star asserts that the pay applications show that the rough-in of the second floor was 90 percent complete as of October 21, 2016, which it argues contradicts the Garcias' testimony that when they first began work, rough-in of the second floor had barely begun. Resp't's Br. 28–29. This appears to be a new claim that was not made before the ALJ, and thus the ALJ did not have the opportunity to clarify any dispute on this point. And this new contention is flawed in numerous respects. The ALJ determined that Torres and the Garcias were assigned to work on the project sometime during the period from June 5, 2016 through August 13, 2017. ALJ Decision 5. Now, Five Star asserts that the Garcias' first day of work was actually October 17, 2016, citing JX-23, which consists of sign-in sheets from various dates. Resp't's Br. 28. As relevant here, the 2016 sign-in sheets included in JX-23 are dated June 8, July 20, August 3, September 9, October 17, November 1, and December 20. JX-23 at DOL 1790, 1923, 1972, 2119, 2249, 2305, 339.[21] Five Star's logic appears to be that because the October 17 sign-in sheet is the first in JX-23 to list the Garcias by name, that was the exact day they began work. Five Star has not explained the basis for that assumption. And to the contrary, Cabral, the foreman, testified that the Garcia brothers had begun working on the project at least by September 17, 2016, based on subcontractor production reports that were submitted into evidence. Tr. 119:17–120:5; JX-26.

[21] It is not clear why Five Star cited pages 1 and 5, which are the first pages of the sign-in sheets for June 8 and July 20.

Five Star also relies on the pay applications as proof that the rough-in of the second floor was 90 percent complete as of October 21, 2016, but Five Star failed to account for the fact that the completion percentage listed in the pay application reflects both work done *and* stored materials. Gilbane project executive Robert Pitcock explained that because the 'percentage complete' line on the pay application includes stored materials, it cannot be used to indicate the actual percentage of work that was completed, and he further stated that the pay application is a billing document, not a reflection of the work that had actually been performed. Tr. 1140:9–14, 1141:6–22, 1143:23–1144:1. Thus, Five Star is not correct that the pay application shows that 90% of the work had been completed as of October 21, 2016. Accordingly, the evidence does not conclusively demonstrate either that the Garcias began work on October 17, 2016, or that the second floor rough-in was 90% complete as of October 21, 2016, so Five Star's attempt to discredit the Garcias' testimony on this basis is meritless. Finally, even if Five Star were correct about what the sign-in sheets and pay applications show, the ALJ would still be permitted to find the Garcias' testimony more credible than the other evidence before him, and doing so would not be error.

Next, Five Star asserts that the as-built drawing contradicts the testimony of Torres and the Garcias, because it claims the drawing does not show cutting, grooving, or threading of pipe, in contrast to their testimony. Resp't's Br. 29. Five Star has not provided any explanation as to how it can determine that "[t]he as-builts do not indicate cutting, grooving, or treading [sic] of pipe as testified to by the Claimants," *id.*, so it is not clear what the basis for this assertion is,[22]

[22] In a footnote, Five Star states that "[t]here are zig-zag lines and other markings on an as-built that show all changes made in the installation, and the lack of these indications conclusively establish there were only a few changes, not the many changes testified to by the Claimants." Resp't's Br. 29 n.4. First, the Administrator does not see any indication on the as-built diagram that all cutting, grooving, and threading is represented by "zig-zag lines and other markings" and second, Five Star has not identified precisely how many markings it believes represent these types of changes, nor identified the particular testimony that it believes is inconsistent with that number.

nor does the Administrator see anything on the as-built that would indicate this is true.[23] Before the ALJ, Five Star argued that the pipe did not need to be cut, grooved, or threaded because it was prefabricated. Resp't's Post-Hearing Br. 22–24. But Torres and the Garcias stated that even though the pipe was prefabricated, it still required modifications to be installed due to the space constraints on site. *See, e.g.*, Tr. 197:14–198:1. Pitcock also testified that there were instances when the pipe had to be cut or modified on site.[24] Tr. 1099:15–1100:9. Once again, to the extent that Five Star's argument is based on the assumption that the prefabricated pipes required no modification, that amounts to a credibility dispute, and the ALJ was entitled to credit the testimony of Torres, the Garcias, and Pitcock, who all said that the pipes had to be modified on site.

Five Star further asserts that the as-built drawing shows that Torres and the Garcias misstated the number of arm-over devices that were installed. Resp't's Br. 29. But Five Star has not provided any details that would allow the Administrator or the ARB to evaluate Five Star's argument on this point. First, Five Star has not stated the number of arm-overs that it believes the as-built shows. Furthermore, Pitcock testified that adjustments for arm-overs would not necessarily show up as changes in the as-built, because the as-built is meant to reflect the number of arm-overs, not their exact positioning. Tr. 1136:12–1137:6. Thus, Five Star has not shown that the as-built drawing contradicts the testimony of Torres and the Garcias. And once again, even if it had done so, the ALJ was permitted to determine that the testimony of Torres and the Garcias

[23] Notably, the "notes" section of the as-built drawing states that "pipe sizes 1 inches and smaller are schedule 40 and were threaded." JX-80 at FP-1.

[24] The as-built drawing shows that 997 sprinkler heads were installed on the Project, including 888 that required escutcheons. JX-80 at FP-2. Presumably, these were the sprinkler heads that needed to be centered in the ceiling tiles. If a large number of sprinkler heads required arm overs to center them in the ceiling tiles, this alone would have required significant cutting and grooving or threading of pipe.

was the most credible evidence on this point; the ALJ was not required to believe that the as-built drawing contained no errors.

Five Star also asserts that the ALJ gave controlling weight to the testimony of the union officials from Local 412 and Local 669. Resp't's Br. 31. Even if this were true, Five Star has not explained why that would not be permissible; to the contrary, under *Fry Brothers*, the ALJ was required to determine the practice of local unions. Five Star points out a typo in a footnote of the ALJ's decision, but it recognizes that the ALJ meant to cite the Local 412 CBA, which he quoted in explaining the types of work that are covered by the CBA: "the installation of all plumbing and/or pipe fitting systems and component parts thereof, including fabrication, assembling, erection, installation, testing, balancing, dismantling, repairing, reconditioning, adjusting, altering, servicing, handling, unloading, distributing, tying on and hoisting of all piping materials, by any method, including all hangers and supports of every description." JX-13 at DOL 1050. The ALJ went on to list the types of tasks that are performed by Local 412 employees, including "unloading, carrying, and organizing pipes and materials; using blueprints or plans; preparing and installing hangers; installing pipe; using a power machine; cutting, grooving pipe, and threading pipe; installing brackets for sprinkler heads and sprinkler heads; hydrostatic testing; caulking; installing escutcheons; and cleaning." ALJ Decision 8. He did not cite a source for this list, but Five Star believes it was drawn from the testimony of the union officials, Eichhorst and Neiderhiser. Resp't's Br. 31. However, Five Star has not explained why the ALJ was not permitted to rely on the testimony of the union officials, except to assert that crediting their testimony would give the officials too much power. But that is not a basis to overturn the ALJ's decision. Rather, under *Fry Brothers*, as discussed *supra*, the ALJ was required to determine whether the work at issue fell within the pipefitter classification by looking

to the practice of union contractors in the area. *See, e.g., Fry Bros.*, 1977 WL 24823, at *6; *Abhe & Svoboda*, 2006 WL 2474202, at *1. Five Star has not presented any argument as to why *Fry Brothers* is not applicable here, nor is there any basis not to apply it. Thus, the ALJ was correct to consider the testimony of the union officials in rendering his decision.

Five Star also claims that Torres's testimony contradicts the testimony of the Garcias that they were instructed to sign in as apprentices, but it does not explain how the testimony is contradictory. Resp't's Br. 31–32. It cites Torres's testimony that he decided to list himself as an apprentice on the sign-in sheets because Jorge Cobian, Five Star's superintendent, and Cabral referred to him as an apprentice when they were speaking to Gilbane, and he "guess[ed]" that the Garcias also signed in as apprentices because he did. Tr. 568:19–571:5. Five Star does not explain how this undermines the Garcias' testimony that Cabral told them to sign in as apprentices. Torres did not testify as to whether he was aware that Cabral told the Garcia brothers to sign in as apprentices. And the Garcias' testimony that Cabral instructed them to sign in as apprentices is consistent with Torres's testimony that he observed that they had done so. Perhaps Five Star believes that because Torres did not say that Cabral told him to sign in as an apprentice, that undermines the Garcias' testimony that Cabral told them to do so, but that is simply speculation; it is entirely possible that Cabral gave that instruction to the Garcias, but not to Torres.

Lastly, Five Star objects to the ALJ's decision to credit the Garcias' testimony that they were instructed to sign in as apprentices instead of Cabral's testimony that he did not tell them to do so. Resp't's Br. 32. This is the classic type of credibility determination that the ALJ, as the trier of fact who witnessed the testimony, is best positioned to make, and Five Star has not provided any reason why the ARB should overrule that determination, aside from the fact that it

simply disagrees with the ALJ's opinion. That is not a basis for overturning the ALJ's decision, and thus, it should be affirmed.

III. FIVE STAR'S ADDITIONAL ARGUMENTS FOR APPLYING THE GENERAL LABORER CLASSIFICATION ARE MERITLESS.

In arguing that Torres and the Garcia brothers performed the work of general laborers, not pipefitters, Five Star asserts that the description of work performed by a common or general laborer is determined by conducting a "tools of the trade" analysis and/or by national standards set by DOL, and it further makes a conclusory assertion that the ALJ should have credited the testimony of Palacios and Pitcock about their purported understanding of "established construction industry practices." Resp't's Br. 33–37.[25] These arguments reflect a misapprehension of the law and a lack of familiarity with basic DBA principles. DBA wage rates are set based on local area practice, so, as noted in section I, the ALJ appropriately looked to local practice, as evinced by the testimony of Eichhorst and Neiderheiser, to determine whether the work performed by Torres and the Garcias fell within the pipefitter classification or the general laborer classification.

The ARB has frequently explained that a fundamental governing principle of Davis-Bacon classification is that "the rate to be paid for particular tasks is the rate found to be prevailing in the locality for that work, regardless of which tools the workers were using." *Abhe & Svoboda*, ARB No. 01-063 *et al.*, 2004 WL 1739870, at *20 (ARB July 30, 2004). The focus on local wage rates and practices is a foundational aspect of the law: "[t]he Act was designed to protect *local* wage standards by preventing contractors from basing their bids on wages lower

[25] Respondent did not cite any specific testimony of Palacios or Pitcock concerning "established construction industry practices," nor is the Administrator able to locate such testimony, so the Administrator is unable to evaluate whether that testimony contradicts the Administrator's position. For example, because the wage determination is based on local practice, not national practice, only testimony concerning local area practice could be relevant.

than those *prevailing in the area*." *Universities Rsch. Ass'n, Inc. v. Coutu*, 450 U.S. 754, 773 (1981) (emphasis added) (internal quotation marks omitted).

Five Star argues that regulations and caselaw establish the scope of work performed by a general laborer (apparently on a nationwide basis), and that the relevant test is whether the laborer uses "tools of the trade." Resp't's Br. 33–35. But the ARB has already squarely rejected those arguments. In *Abhe & Svoboda*, as here, the contractors argued that a "tools of the trade" analysis, under which a worker would be classified based on which tools they used, should determine the appropriate classification for the work at issue, rather than looking to the union classification and pay practices that prevailed in the locality where the work was performed. *Abhe & Svoboda*, 2004 WL 1739870, at *20. The ARB "reject[ed] [the contractors'] arguments for a 'tools of the trade' analysis in making wage determinations," explaining that "[s]ince there is no generally accepted agreement as to which 'tools' belong to which 'trade,' allowing contractors to make their own decisions would lead to inconsistent results." *Id.* Instead, the ARB explained, "the *actual* governing principle in DBRA classification cases" is that "the rate to be paid for particular tasks is the rate found to be prevailing in the locality for that work, regardless of which tools the workers were using." *Id.* (emphasis added). Therefore, it is "incumbent upon the . . . contractor[] to go beyond the list of job classifications on the wage determination to ascertain the actual local area practice." *Id.* Five Star's reliance on the regulatory definition of "laborer or mechanic" at former 29 C.F.R. 5.2(m)[26] is equally unavailing. As the ARB has explained, this definition "does not define the scope of the work which a worker may perform (under the DBA) and still be properly classified as a laborer." *Johnson-Massman, Inc.*, ARB No.

[26] On August 23, 2023, the Department published a final rule, "Updating the Davis-Bacon and Related Acts Regulations," 88 FR 57526, that became effective on October 23, 2023. However, all citations to DBA implementing regulations in this brief refer to the prior regulations that were in effect at the time of the events at issue in this case.

96-118, 1996 WL 566043, at *2 (ARB Sept. 27, 1996). Instead, identifying the exact duties laborers may perform "is a matter defined on a case by case basis as reflected by the particular area practice prevailing in a locality." *Id.* And because the union wage rate prevailed for the relevant classification, the ALJ was required to look to the practice of union contractors in the area. *See, e.g., Fry Bros.*, 1977 WL 24823, at *6. Thus, Five Star is not correct that the ALJ was required to perform a "tools of the trade" analysis to determine whether the work at issue falls within a particular classification.

Five Star also includes an extensive discussion of job descriptions found in the Department of Labor's O*NET database. Resp't's Br. 35–37. But Five Star's reliance on the general job descriptions provided by O*NET is similarly unhelpful, as it once again reflects a lack of recognition that DBA classifications are determined based on the local area, not nationwide. O*NET, the Occupational Information Network, is an online resource center sponsored by the Department of Labor's Employment and Training Administration. It is an interactive application for exploring and searching occupations. About O*NET, O*NET RESOURCE CENTER, *available at* http://www.onetcenter.org/overview.html (last visited Jan. 30, 2024). Its purpose, among other things, is to "help[] people find the training and jobs they need, and employers the skilled workers necessary to be competitive in the marketplace." *Id.* Although O*NET may occasionally provide a useful starting point for distinguishing classifications, it is a *nationwide* database of *general descriptions*, and thus it does not provide adequate information to make the area-specific determinations required by the Davis-Bacon Act.

Lastly, Five Star argues that the ALJ was incorrect to rely on the testimony of the business agents of the local unions, Eichhorst and Neiderheiser, concerning local area practice. But contrary to Five Star's surprising assertion that it was unable to find a case where an ALJ

decided a classification case on the basis of union officials' testimony, Resp't's Br. 33, the use of such testimony to aid classification determinations is well-established. *See, e.g., Johnson-Massman*, 1996 WL 566043, at *3 (crediting testimony of union business agent that work at issue fell within local ironworker union jurisdiction, and thus was required to be paid at union welder rate, not laborer rate); *Trataros*, 1993 WL 306698, at *4 (affirming ALJ decision relying on testimony of business managers of two unions concerning duties performed by members of craft, which showed that workers in question performed duties that fell within union classifications, but were misclassified as general laborers or helpers); *cf. More Drywall*, 1991 WL 494732, at *2 (instructing that where a union wage rate prevails in a classification, "the practices by contractors signatory to those agreements are to be followed on the project," and thus looking to data provided by union concerning type of work performed by union members).

Accordingly, because Five Star advocates for the application of a "tools of the trade" standard repeatedly rejected by the ARB, and additionally fails to recognize that DBA classification determinations are based on local area practice, not nationwide, its arguments on this point are meritless. The ALJ applied the correct standard, which requires looking to local area practice as evinced by the relevant CBA and testimony of the union business agents. The ALJ's well-reasoned decision was grounded in this and similar authority and should be upheld.

IV. THE ALJ CORRECTLY DETERMINED THAT FIVE STAR SHOULD BE DEBARRED.

The ALJ determined that Five Star's misclassification of Torres and the Garcias constituted "at least gross negligence or willful blindness" justifying debarment, and thus ordered that Five Star be debarred for three years, as required under 29 C.F.R. 5.12(a)(1).[27] Five

[27] Once the Administrator establishes grounds for debarment under the DBA, a three-year debarment period is mandatory; evidence of "mitigating" or "extraordinary" circumstances is irrelevant. *G&O General Contractors, Inc.*, WAB No. 90- 35, 1991 WL 494740 at *1-2 (WAB Feb. 19, 1991).

Star asks the ARB to reverse that ruling. But the ALJ's determination that Five Star's actions warrant debarment was correct, and the ARB should affirm that decision.

A contractor will be debarred if it is found to have "disregarded their obligations to workers or subcontractors under the Davis–Bacon Act." 29 C.F.R. 5.12(a)(1); *see also* 40 U.S.C. 3144(b) (providing for debarment of any person found to have "disregarded their obligations to employees and subcontractors" under the Act). Importantly, as the ARB has explained, this standard is markedly lower than the prior standard for debarment under the Davis-Bacon Related Acts ("DBRA"), which provided for debarment only in the case of "aggravated or willful violation[s]." *NCC Electrical Servs., Inc.*, ARB No. 13-097, 2015 WL 5781073, at *6 (ARB Sept. 30, 2015).[28] Thus, under the DBA, an employer's wrongful actions "need not rise to the level of a willful violation contemplated in the debarment standard under the DBRA; intentional failure to look at the law is sufficient." *Id.* "Intentional disregard of obligations may therefore include acts that are not willful attempts to *avoid* the requirements of the DBA." *Id*. Accordingly, "[r]ead in its proper context, the regulation does not allow contractors and subcontractors to ignore the rules and regulations applicable to DBA contracts, pay their employees less than prevailing wages, and avoid debarment by asserting that they did not intentionally violate the DBA because they were unaware of the Act's requirements." *Id.* at *7; *see also Interstate Rock Products*, ARB No. 15-024, 2016 WL 5868562, at *4 (ARB Sept. 27, 2016) (same).

The ARB and federal courts have explained that contractors have an affirmative duty to educate themselves as to DBA requirements and local area practice to ensure they comply with the law. There is "a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows . . . what the company and its

[28] The updated Davis-Bacon and Related Acts regulations that became effective on October 23, 2023 eliminated the higher standard for DBRA debarment. 29 C.F.R. 5.12(a)(1).

competitors must pay when it contracts with the federal government." *NCC Electrical Servs.*, 2015 WL 5781073, at *7 (internal quotation marks omitted); *see also Ray Wilson Co.*, ARB No. 02-086, 2004 WL 384729, at *10 (ARB Feb. 27, 2004) (same). Specifically, as relevant here, federal contractors may not "exercise less than a reasonable effort to determine the practice of signatory unions when wage determinations are based on collective bargaining agreements." *Abhe & Svoboda*, 508 F.3d at 1062 (citing *Fry Brothers*). Thus, if a company believes that local practices for classifying work are unclear, it has a duty to seek clarification, by, for example, contacting the local unions or the Department of Labor. *Id.*; *see also* 29 C.F.R. 5.13(a) (allowing for submission of "questions relating to the application and interpretation of wage determinations (including the classifications therein)" to Department of Labor). But a company engaged in work subject to the DBA is not permitted to simply "ignore the obvious." *Abhe & Svoboda*, 508 F.3d at 1062.

Here, the ALJ noted certain facts that he found particularly relevant to show that Five Star disregarded its obligations under the DBA: 1) that Five Star had "preexisting familiarity with the DBA," 2) that Torres and the Garcias listed incorrect classifications when signing into work, and 3) Cabral's instruction to the Garcias to drop their questions about their pay rate. ALJ Decision 18. All of these facts support the ALJ's determination.

First, Luis and Veronica Palacios had extensive knowledge of the DBA and its requirements (which Five Star does not deny, *see* Resp't's Br. at 38). Veronica Palacios had reviewed the DBA requirements and attended a DOL seminar that specifically covered the DBA. Tr. 1042:17–1043:8, 1048:11–1049:7. And Luis Palacios, who was responsible for making classification decisions for Five Star, testified that Five Star has always worked on some type of DBA or other prevailing wage project. Tr. 643:20–24, 646:15–19. He previously worked on

"hundreds" of DBA or other prevailing wage jobs as a foreman, project manager, and company president. Tr. 643:13–16. Prior to Five Star, he worked for three years for Western States Fire Protection as a foreman and project manager, where he was responsible for overseeing compliance with the DBA, and before that, he had responsibility for ensuring compliance with the DBA as a foreman for Sun City Fire Protection. Tr. 653:21–23, 654:5–8, 1243:22–24, 1247:15–23, 1248:18–24, 1249:2–24. Additionally, he attended at least one conference discussing the DBA as a member of the El Paso Association of Contractors. Tr. 1260:14–1261:5.

Furthermore, Luis Palacios was familiar with Local 412 and had experience as a member of Local 669. Tr. 652:1–4, 653:8–11, 662:20–21. He was aware that where the Local 669 CBA applied, it asserted jurisdiction over the type of work Torres and the Garcias performed. *See* Tr. 655:15–656:1, 1374:6–12. Because both Local 669 and Local 412 are affiliates of the same international union and incorporate the international union's constitution and articles of jurisdiction, an employer who is familiar with Local 669 would know or have reason to believe that Local 412 had a similar, if more expansive, jurisdiction of work. *See* JX-13 at DOL 1050–1051; JX-14 at DOL 1159–62. But in fact, Palacios made no effort to determine the practice of Local 412 regarding the pipefitter job classification. Tr. 665:3–666:21 (Palacios did not read the portion of the Wage Decision explaining prevailing union classifications.); Tr. 667:21–668:6, 1376:3–7 (he did not contact Local 412 to inquire about the work it claimed, either to clarify the rates of pay for tasks performed, or to request a copy of its CBA). Neither Luis nor Veronica Palacios sought clarification from the Administrator regarding the significance of union-prevailing job classifications in wage determinations. Tr. 669:10–16. Based on his extensive prior experience, Luis Palacios either knew, or, with the exercise of reasonable diligence should

have known, that Local 412 claimed all of the work that Five Star employees performed at Holloman AFB.

Second, Cabral, acting on behalf of Five Star, directed Torres and the Garcias to sign in at the Project site as apprentices, and introduced Torres to Gilbane personnel as an apprentice, which conveyed a false impression that Five Star was in compliance with DBA requirements. Tr. 183:1–184:20, 440:7–441:5, 568:25–569:12; JX-23 at DOL 341, 2254, 2307, 2575, 2734, 2834. Thus, Gilbane's onsite supervisors would have had no reason to question why laborers, rather than sprinkler fitter apprentices, were installing the Project's fire protection system.[29] This fact indicates that Five Star understood that Torres and the Garcias should have been classified as pipefitters, not laborers, and took steps to conceal the fact that they had been misclassified as laborers from Gilbane.

Third, Cabral testified that when each of the Garcias separately discussed their pay rates with him, Cabral told them not to tell Cobian because he would remove them from the job. Tr. 187:18–188:2, 451:20–453:10, 1173:13–24. This statement demonstrates not only that Cabral was unsurprised by the Garcias' concerns regarding misclassification, but that he knew that the Garcias could face potential retaliation for raising the issue. It also suggests that Five Star was aware that the workers had been misclassified, and chose to attempt to conceal the issue, rather than to address it.[30]

[29] Although Five Star labelled Torres and the Garcias as laborers on the certified payrolls submitted to Gilbane, a payroll clerk reviewing them would not know what particular job they performed, and thus would have no reason to question their listed classification. *See* Joint Pretrial Stipulations ¶¶ 14, 18; Tr. 672:18–673:17, 1108:1–10.

[30] Additionally, Five Star's failure to reclassify the Garcias as apprentices on the certified payrolls after their registration in Five Star's approved apprenticeship program on May 3, 2017, demonstrates that Five Star submitted certified payrolls that listed misclassified employees paid at a lesser rate. Joint Pretrial Stipulations ¶¶ 18, 26, 28, JX-25 at DOL 7135–7138. Any argument that Five Star believed it was overpaying the Garcias (not considering fringe benefits) because the 50% apprentice wage rate was less than the laborer wage rate would confirm that Five Star knowingly submitted false certified payrolls. Standing alone, Five Star's failure to correct the certified payroll records creates an inference of intent to misclassify employees, given Luis Palacios' extensive experience with the DBA, as explained above.

These facts are clearly sufficient to satisfy the standard for debarment under the DBA. Not only was Five Star subject to the presumption that an employer capable of bidding on a DBA job knows what it must pay its workers on a DBA job, *see NCC Electrical Servs.*, 2015 WL 5781073, at *7, but the uncontested evidence shows that Luis Palacios in fact had many years of extensive experience in ensuring compliance with the DBA, both at Five Star and with his previous employers. Furthermore, he was familiar with the CBAs and the jurisdictions of Local 412 and Local 669. And moreover, the evidence made clear that Luis and Veronica Palacios did not make "a reasonable effort to determine the practice of signatory unions" where, as here, the wage determination was based on a collective bargaining agreement. *See Abhe & Svoboda*, 508 F.3d at 1062. Indeed, it is not apparent that Five Star made any effort at all to ensure that the workers were properly classified. Thus, debarment is clearly warranted here.

Five Star's actions are very similar to those of the employer in *NCC Electrical*, in which the ARB determined that debarment was appropriate. In *NCC Electrical*, the employer simply failed to inquire into his obligations under the DBA. 2015 WL 5781073, at *7–8. Instead of researching what he was required to do under the DBA, the employer decided how to classify employees on his own, based on their "applications, resumes, licensure and experience." *Id.* at *7. The ARB also cited the employer's "fail[ure] to keep proper records tracking the actual work performed by the workers" as an additional fact supporting debarment, because it "further prevented [the employer] from complying with the DBA obligations to pay workers according to the work performed." *Id.* Similarly, here, as in *NCC Electrical*, Five Star does not deny that it failed to inquire into local area practice to determine whether the work that Torres and the Garcias performed fell within the pipefitter classification, as determined by the relevant CBA and local union practice. Tr. 665:3–666:21, 667:21–668:6, 669:10–16, 1376:3–7. Instead, like

the employer in *NCC Electrical*, Five Star decided how to classify workers based on their skill level, rather than evaluating whether the workers performed tasks that fell within the pipefitter classification. Joint Pretrial Stipulations ¶¶ 20, 25; Tr. 1272:19–23. And Five Star did not maintain documents to identify the tasks that each employee performed each day; instead, Luis Palacios attempted to make a *post hoc* calculation of the time the workers spent on tasks, relying heavily on Cabral's memory. JX-29 ¶¶ 83–86; Tr. 746:20–747:6, 758:23–760:9, 1341:2–8, 1382:20–1386:9. Thus, under *NCC Electrical*, these facts are sufficient to establish the requisite "element of intent" of Five Star's failure to comply with DBA regulations. *See NCC Electrical*, 2015 WL 5781073, at *8.

In arguing that it should not be debarred, Five Star cites various factors that it believes should weigh against debarment, including that it apparently has not previously been cited for a DBA violation, that it cooperated with WHD's investigation, that it has an "open door" policy and asks employees to raise concerns internally, and that Gilbane took steps to ensure compliance such as putting up DBA posters. Resp't's Br. 38–39. But these factors are not relevant to the determination of whether Five Star should be debarred. As discussed above, the key question is whether Five Star intentionally failed to inform itself of its obligations to its employees under the DBA, *NCC Electrical Servs.*, 2015 WL 5781073, at *6, including having failed to make "a reasonable effort to determine the practice of signatory unions" where, as here, the wage determination is based on a collective bargaining agreement. *Abhe & Svoboda*, 508 F.3d at 1062. Five Star has not shown that it made an effort to understand how to classify the employees on this specific project or to understand what type of work fell within the pipefitter classification, as governed by the Local 412 CBA and the practice of the union. Rather, Five Star

simply chose to "ignore the obvious," *Abhe & Svoboda*, 508 F.3d at 1062, and thus, debarment is appropriate.

Five Star also cites two ALJ decisions to suggest that some level of fraud or bad faith must be shown for debarment to be warranted. Resp't's Br. 42–43. The first case cited by Five Star, *Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ Apr. 7, 2000), concerns debarment for projects covered by the Davis-Bacon *Related Acts*, not the DBA. *Cody Zeigler* at 34. As discussed *supra*, the standard for debarment under the DBRA was higher than that of the DBA, requiring a level of willfulness beyond that of the DBA. Accordingly, *Cody Zeigler* is not relevant here. And in the other case cited by Five Star, *Whiting-Turner/Walsh Joint Venture*, No. 2015-DBA-00014 at 65 (ALJ Oct. 19, 2017), the ALJ recited the DBRA debarment standard from *Cody Zeigler* immediately before making his determination that the respondent should not be debarred, indicating that the ALJ also applied the incorrect standard there. Thus, Five Star's citation to *Whiting-Turner* also does not provide helpful guidance here.

In sum, because Five Star failed to satisfy its obligation to understand how to appropriately classify the workers on the Project, and instead, took steps to conceal the misclassification of Torres and the Garcias, the ALJ correctly determined that debarment is appropriate. That decision should be upheld.

V. THE ADMINISTRATOR TAKES NO POSITION AS TO HOW THE ARB SHOULD MANAGE ITS DOCKET.

Five Star briefly suggests that the pending decision of the U.S. Supreme Court in *Securities and Exchange Commission v. Jarkesy* may have an impact on this case. Resp't's Br. 44 (citing *SEC v. Jarkesy*, No. 22-859). It does not appear that Five Star is making an argument that the procedure the Administrator used to bring this enforcement action violates the well-

established law in this area in any way.[31] However, to the extent that Five Star believes the ARB should stay its decision in this case pending the outcome of *Jarkesy*, the Administrator does not take a position as to how the ARB should manage its docket.

CONCLUSION

For the foregoing reasons, the ALJ correctly determined that Five Star misclassified the work of the Torres and the Garcias on the Project, that it owes them a total of $71,285.49 in back wages, and that it should be debarred for three years. The ARB should affirm that decision.

Dated: February 8, 2024

Respectfully submitted,

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[31] Five Star asserts in passing that because one purpose of the DBA is to ensure living wages for workers, the rights created by the DBA are private, not public, in nature, and further, it contends that this case is similar to *Jarkesy* because it involves a federal agency suing a private party to obtain redress for individuals. Resp't's Br. 44. Given the fact that Five Star has not provided any discussion of this potential argument, including citations to any cases or statutes, the Administrator does not take it to be an argument warranting rebuttal, but rather merely a suggestion to the ARB that this case could potentially be impacted by the *Jarkesy* decision. However, to the extent that Five Star is attempting to make an actual argument here, the Administrator's response is that the rights implicated in this case are public, not private, in nature, and thus Five Star has no right to a jury trial, and further, the procedure the Administrator followed to bring this enforcement action is lawful.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation set forth in the Board's September 29, 2023 order in this case because it contains 40 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the required format set forth in the Board's September 29, 2023 order in this case because it has been prepared in a proportionally spaced typeface, 12-point Times New Roman, double-spaced, using Microsoft Word 365.

s/ Sarah M. Roberts
SARAH M. ROBERTS

CERTIFICATE OF SERVICE

I hereby certify that, on February 8, 2024, I electronically filed the foregoing Response Brief of the Administrator of the Wage and Hour Division via the Board's Electronic Filing and Service (EFS) system. All participants in the case are registered EFS users and service on them will be accomplished by the EFS system.

s/ Sarah M. Roberts
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