NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CSL, L.L.C., a Florida limited liability company, Plaintiff - Appellant, v. IMPERIAL BUILDING PRODUCTS, INC., a company organized under the laws of Canada; et al., Defendants - Appellees.	No. 05-15931 D.C. No. CV-03-05566-JCS MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted January 10, 2006[**]
San Francisco, California

Before: TASHIMA, W. FLETCHER, and CALLAHAN, Circuit Judges.

Plaintiff CSL, L.L.C. (CSL) appeals from the district court's post-judgment order denying its motion to find defendants Imperial Building Products, Inc. and

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Imperial Brush Company, Ltd. (Imperial), in contempt of court for violating the district court's April, 2004, Final Judgment and Injunction (the consent agreement). The consent agreement settled CSL's false advertising claims against Imperial. It prohibits Imperial from selling a synthetic fire log claiming to reduce creosote in residential chimneys without demonstrating that the log has the capability to reduce creosote, and from misrepresenting the creosote-removing abilities of any such log.

This court reviews the district court's order denying CSL's motion for contempt for an abuse of discretion. *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004). The district court abuses its discretion when it makes an error of law or bases its decision on a clearly erroneous finding of fact. *Hallett v. Morgan*, 296 F.3d 732, 749 (9th Cir. 2002).

The district court's decision to exclude evidence under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), also is reviewed for an abuse of discretion. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). However, the applicability of *Daubert* and the interpretation of a consent decree are questions of law reviewed de novo. *Nehmer v. Veterans' Admin.*, 284 F.3d 1158, 1160 (9th Cir. 2002); *McKendall v. Crown Control Corp.*, 122 F.3d 803, 805 (9th Cir. 1977).

The district court held that the tests conducted by both parties were scientifically unreliable under Federal Rule of Evidence 702 and *Daubert*. On appeal, CSL argues that the district court erred by concluding that its testing methodology was deficient under *Daubert*. We hold that the district court did not abuse its discretion by relying on the absence of peer review, the lack of general acceptance in the scientific community, and the absence of a known rate of error for the testing methodology to determine that CSL's log testing was not scientifically reliable. *See Daubert*, 509 U.S. at 593-94.

The district court further concluded that CSL must provide admissible evidence under Rule 702 to establish that Imperial violated paragraph one of the consent agreement because that violation required a determination that certain facts were false. However, the district court concluded that reliability under Rule 702 was not required with respect to paragraph two of the agreement, which forbids sale of a SUPERSWEEP log unless the log has the "demonstrated capability" to remove or reduce creosote in chimneys.

A settlement agreement is treated as a contract for purposes of interpretation, and the intent of the parties determines the meaning of the contract. *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992). We do not agree with the district court that different evidentiary standards were

contemplated for enforcement of the two paragraphs of the consent agreement. The agreement is silent on evidentiary standards and the words "prove" and "demonstrate" cannot be interpreted as warranting different applications of the Rules of Evidence. We hold that the intent of the parties was to enter into an enforceable contract whereby compliance, including a determination of falsity, would be determined by the testing methodology known at the time the parties entered into the agreement–comparing data obtained from control and test fires.

Paragraph One

Although we reject the district court's conclusion that Imperial was not in violation of paragraph one because CSL's evidence of falsity was deficient under Rule 702, we agree with the district court's alternative holding–that CSL's evidence failed to establish that Imperial's representations were false by clear and convincing evidence. The district court did not abuse its discretion when it concluded that the different results reached by CSL's tests did not establish by clear and convincing evidence that Imperial's test results were erroneous or that their representations were false. Therefore, we agree that Imperial is in compliance with paragraph one of the consent agreement.

Paragraph Two

The district court conflated the issues of whether Imperial violated the terms of the consent agreement and whether Imperial was in contempt of court for violating the agreement. The district court determined that the reliability problems with Imperial's tests were reasonable, given the limitations of the testing methodology. This reasonableness inquiry pertains to a contempt finding, not to a determination of whether Imperial was in compliance with the agreement. *See Go-Video v. Motion Picture Ass'n of Am.*, 10 F.3d 693, 695 (9th Cir. 1993). The district court then concluded–based at least in part on the reasonableness findings–that Imperial's tests were sufficient to demonstrate that Imperial was in compliance with paragraph two of the consent agreement.

We construe the words "demonstrated capability" in the context of determining whether Imperial was in compliance with the consent agreement as requiring a showing that the SUPERSWEEP Plus log does what Imperial claims it does–reduce creosote. The magistrate judge himself acknowledged "[t]he Court does not know whether the SUPERSWEEP Plus does what it claims." We agree. The evidence does not demonstrate that the SUPERSWEEP Plus log works. Therefore, the district court erred by concluding that CSL did not meet its burden as to paragraph two. We hold that Imperial is in violation of paragraph two of the consent agreement.

The magistrate judge denied CSL's motion for a finding of contempt based at least in part on its conclusion that Imperial was in compliance with the consent agreement. Because we hold that Imperial was not in compliance with paragraph two of the consent agreement, we remand this case to the district court for further proceedings in light of this holding.

The parties shall bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.