GRANTED

No. 99-1551

IN THE
Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS
OF MARYLAND

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In a suit by petitioner against respondent in California state court, respondent removed the case to federal court on the basis of diversity jurisdiction and obtained a dismissal on the ground that the California statute of limitations had run. Petitioner then brought the present suit against respondent in state court in Maryland – a state whose relevant statute of limitations had not yet run. Rejecting petitioner's argument that this Court's decisions (especially *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874), and *Hancock National Bank v. Farnum*, 176 U.S. 640, 644-45 (1900)), required the Maryland court to follow California preclusion law (which would not impose a res judicata bar to the Maryland action), the Maryland state courts looked only to federal law and interpreted that law as requiring dismissal of the action on the basis of res judicata. The questions presented are:

1. Is this Court's holding in *Dupasseur* – that the res judicata effect of the judgment of a federal court sitting in diversity "is such as would belong to judgments of the State courts rendered under similar circumstances," and that "no higher sanctity or effect can be claimed," 88 U.S. at 135 – still good law?

2. If *Dupasseur* is overruled or modified by this Court, what should be the res judicata effect of a statute-of-limitations dismissal in a federal court diversity suit?

RULE 29.6 STATEMENT

Petitioner Semtek International Incorporated has no parent corporation and no publicly held company owns any of its stock. Semtek International Incorporated has now merged into Semtek International Corporation, a New Jersey corporation.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Maryland circuit court dismissing petitioner's suit on the basis of res judicata, App. 36a-47a, is unreported. The decision of the Maryland Court of Special Appeals, App. 1a-34a, affirming the trial court is reported at 736 A.2d 1104. The order of the Maryland Court of Appeals denying review, App. 35a, is unreported.

JURISDICTION

The Maryland Court of Special Appeals entered a final judgment affirming the state circuit court's order of dismissal on September 7, 1999. The Maryland Court of Appeals denied Semtek's timely state-court petition for discretionary review on December 21, 1999. This Court granted Semtek's timely petition for a writ of certiorari on June 26, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Full Faith and Credit Clause, Art. IV, § 1, the Full Faith and Credit Act, 28 U.S.C. § 1738, the Rules of Decision Act, 28 U.S.C. § 1652, and Fed. R. Civ. P. 41(b) are set out in the Addendum to this brief.

STATEMENT

Petitioner Semtek International Incorporated ("Semtek") brought this lawsuit against respondent Lockheed Martin Corporation ("Lockheed") in Maryland state court alleging various torts, none of which arises under federal law. The suit was timely under Maryland's three-year statute of limitations. The question presented is whether Semtek's suit is barred by res judicata because a federal district court sitting in diversity in

California previously dismissed, under California's two-year statute of limitations, a different suit brought by Semtek against Lockheed. Under both California and Maryland law, Semtek's Maryland suit is not barred by res judicata, and under precedents of this Court that have been settled for more than a century, it makes no difference that a federal district court rather than a California state court dismissed the California action. The judgment below accordingly should be reversed.

1. The California Action.

a. Semtek was formed in 1992 to contract with emerging Russian enterprises, particularly with respect to satellite ventures.[1] Between late 1992 and early 1993, Semtek entered into various agreements with Merkuriy, Ltd., which had been licensed by the Russian Space Agency, with the approval of the Russian Defense Ministry, to contract for the commercial use of Russian satellites, culminating in a joint venture for the financing, development, and use of Russian satellite telecommunication services. App. 49a. In July 1994, Merkuriy informed Semtek that the joint venture might be in jeopardy as a result of the involvement of Martin Marietta Technologies, Inc. ("Martin Marietta"), and a third party. App. 50a. Semtek then contacted a representative of Martin Marietta, Samuel M. Ursini, and the president of the third party, Transworld Communications ("Transworld"), advising them of Semtek's relationship with Merkuriy. App. 51a. On August 8, 1994, Merkuriy informed Semtek that it would not proceed with the joint venture. Merkuriy subsequently contracted with Martin Marietta and Transworld to provide the services contemplated by its joint venture with Semtek. App. 52a.

b. In February 1997, Semtek sued Lockheed (Martin

[1] The description of the parties' relationship is summarized from the allegations of Semtek's Maryland complaint, which for purposes of these proceedings must be accepted as true. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). For a more detailed description of the complaint's allegations, see App. 49a-52a.

Marietta's successor in interest) and Ursini in California state court alleging business torts arising from the defendants' wrongful conduct (hereinafter "the California action"). App. 2a. Because Ursini was a California resident (Complaint ¶ 4), there was no evident basis for removal. But before Semtek formally served the defendants, Lockheed learned of the suit and immediately removed to federal district court on the ground that Ursini was not yet formally a party. *See* 28 U.S.C. § 1441(b). Semtek filed a motion to remand to state court, which the district court subsequently denied. App. 61a.

Seven days after removing the case, Lockheed moved in the district court to dismiss on a single ground: California's statute of limitations. As Lockheed has explained in its brief in opposition in this Court ("BIO"), "Semtek's own complaint and representations established that California's two-year statute of limitations had expired." BIO 2. Thus, Lockheed's motion was presented to, and considered by, the district court before any factual development in the case and without regard to the merits of Semtek's claims. Notably, Lockheed did not request that the district court enter an order of dismissal that would carry greater preclusive effect than an equivalent order entered by a state court.

The district court granted Lockheed's motion to dismiss, concluding that "California courts have held that the two-year statute of limitations" applies to the causes of action alleged by Semtek. App. 54a (collecting cases). According to the court, "the Complaint reveals that, as early as July 5, 1994, Plaintiff was notified that its prospective joint venture could be in jeopardy due to the involvement of Martin Marietta and Transworld" as well as that "in July 1994, Plaintiff was also aware of Martin Marietta's (and, therefore, Ursini's) potential liability for interference with Plaintiff's prospective business relationship with Merkuriy" and that "its agreement with Merkuriy was breached on August 8, 1994." *Id.* 55a-56a. Furthermore, Semtek's "Complaint fails to state a viable basis for tolling of the statute." *Id.* 57a. Thus, the suit "could not have

accrued any later than August 8, 1994, the date of the admitted breach," such that the California statute of limitations expired in August 1996, approximately seven months before Semtek filed the California action.

c. In many instances, when a district court dismisses an action as inadequately pleaded, it will grant the plaintiff the opportunity to amend or to file a new action containing sufficient allegations. Here, however, the district court declined to follow such a course because of its conclusion that the pleadings definitively established that Semtek could not state a claim under California law. On May 5, 1997, the California district court granted the motion to dismiss and issued a dismissal order that provided in relevant part:

> According to the allegations of Plaintiff's Complaint, the two-year statute of limitations could not have been tolled by fraudulent concealment. The applicable statute of limitations bars this action in its entirety. Accordingly, [plaintiff's Complaint] must be DISMISSED WITH PREJUDICE because, given the allegations in the Complaint, amendment would be futile (Plaintiff cannot plead around or contradict its current allegations).

App. 58a.

On May 7, 1997, without being directed to do so by the district court,[2] Lockheed lodged with the court a proposed judgment purporting to effectuate the dismissal order. Lockheed's proposed judgment included language specifying that the dismissal was "on the merits" – language not used in the dismissal order. The proposed judgment was mail-served on May 7, 1997 and was not received by Semtek until May 8.

On May 8, 1997, without affording Semtek any opportunity

[2] *Compare* Fed. R. Civ. P. 58 ("Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.").

to object to the proposed judgment,[3] the California district court entered the judgment with the extraneous language inserted by Lockheed. App. 59a. The judgment thus provided that "the action be dismissed in its entirety on the merits and with prejudice." *Id.* The district court did not indicate that its judgment would have any res judicata effect different from that of an equivalent judgment entered by a California state court.

On Semtek's appeal, the Ninth Circuit affirmed the district court's judgment. No. 97-55840, 1999 U.S. App. LEXIS 3150 (CA9 Feb. 25, 1999) (unpublished).

2. The Maryland Action.

a. "[A]dditional investigation by Semtek revealed that much of the alleged tortious conduct occurred in Maryland," App. 37a, where Lockheed is headquartered. App. 4a n.1. On July 2, 1997, Semtek filed suit against Lockheed in Maryland state court. App. 3a, 62a.

This second lawsuit is timely under Maryland's three-year statute of limitations. App. 37a, 62a & n.2. See BIO 4 (not disputing timeliness of the Maryland case for purposes of proceedings in this Court).

b. California law would permit the second lawsuit to proceed. California follows the majority rule, under which a statute-of-limitations dismissal ordinarily does not preclude suit in a different jurisdiction where it is timely under the relevant limitations period. Restatement (Second) of the Conflict of Laws §§ 142, 143 (1971); *id.* § 142 (rev. 1989). "[E]ach state determines for itself when a claim becomes stale. Hence maintenance of an action in the state of the forum is not ordinarily precluded by the fact that it is barred by the statute of limitations of another state . . . ." § 142, cmt. g.

Lockheed acknowledges that "California res judicata law . . . does not treat limitations dismissals as judgments on the merits

[3] *Compare* Local Rules 14.6 and 14.7 of the U.S. District Court for the Central District of California; Fed. R. Civ. P. 6(e) (together providing for the filing of objections within eight days after service).

with claim preclusive effect." BIO 18. Although California applies an unusually short two-year statute of limitations for business torts, it has provided that a dismissal on the basis of its limitations period will not preclude another state from applying a longer statute of limitations. Thus, under California law, the dismissal did not bar Semtek from suing Lockheed in another state that has adopted a longer statute of limitations if the other state would permit such a suit. *E.g.*, *Koch* v. *Rodlin Enters., Inc.*, 223 Cal. App.3d 1591, 1595-96 (1990); *see also Lackner* v. *LaCroix*, 602 P.2d 393, 395 (Cal. 1979); *Goddard* v. *Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939).

The fact that, under the common law rule adopted by California, a statute-of-limitations dismissal is not res judicata in a second suit in another state with a longer limitations period does not necessarily mean that the second suit will be allowed to proceed. The second state may elect to "borrow" the statute of limitations of the first. Restatement (Second) of the Conflict of Laws § 142(1) & cmt. f (1971); § 142 & cmt. b (Rev. 1989). Maryland, however, has determined not to borrow the statute of limitations of a sister state in a business tort suit such as that filed by Semtek against Lockheed. *E.g.*, *Turner* v. *Yamaha Motor Corp., U.S.A.*, 591 A.2d 886 (1991). Instead, under Maryland law, such a suit if brought in Maryland is governed by Maryland's three-year statute of limitations. Md. Cts. & Jud. Proc. Code Ann. § 5-101 ("A civil action at law shall be filed within three years of the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."); *accord* BIO 3 ("Relevant Maryland law provided for a three-year statute of limitations.").

c. Lockheed twice turned to the federal courts in failed efforts to block the Maryland action. Lockheed first unsuccessfully attempted to remove the case to the district court for the district of Maryland. The district court, rejecting Lockheed's argument that a federal defense is a basis for removal, remanded the case to Maryland state court. *Semtek Int'l v. Lockheed Martin Corp.*, 988 F. Supp. 913 (D. Md. 1997);

accord Rivet v. Regions Bank, 522 U.S. 470 (1998) (so holding).

Lockheed also unsuccessfully moved in the California district court to enjoin the Maryland action under the All Writs Act, 28 U.S.C. § 1651(a). The district court denied Lockheed's motion. While cautioning that its statements were dicta, App. 71a n.17, the court reiterated that its prior decision had rested on the California statute of limitations and "did not reach the substantive merits of Plaintiff's tort claims." App. 71a. Furthermore, because Semtek's filing of the Maryland action was not in any sense "vexatious" or "patently without merit," the district court concluded it would be inappropriate to deprive the Maryland courts of the opportunity to resolve the question whether the judgment in the California action was res judicata. *Id.* Accordingly, the California district court concluded that it would not bar "another proper forum" from "afford[ing] Plaintiff the opportunity to fully litigate the merits of its causes of action" if that forum would not apply "a statutory or res judicata bar." *Id.* Indeed, the district court opined that "it is not obvious to this Court that res judicata applies to bar Plaintiff's action in Maryland state court." *Id.* at 71a n.17.[4]

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[4] After the California district court refused to grant Lockheed's motion for an injunction and opined that the dismissal "did not reach the substantive merits of Plaintiff's tort claims," App. 71a, Semtek applied to the Ninth Circuit for a limited remand to file motions in the California district court formally to amend the judgment under Fed. R. Civ. P. 60(a) governing clerical errors and Fed. R. Civ. P. 60(b)(6) allowing for extraordinary relief. Semtek sought a further order to confirm the California district court's dicta (App. 71a n.17) that the dismissal had not reached the substantive merits of the case and that the judgment was without prejudice to Semtek's suing Lockheed in another forum. Without prejudice, the Ninth Circuit denied Semtek leave to file the Rule 60(b)(6) motion. The Ninth Circuit requires that the trial court first indicate that it will entertain a motion to amend an appealed judgment under Rule 60(b)(6) before the Ninth Circuit will issue a limited remand allowing the motion to be heard. Record Excerpts 590. But the Ninth Circuit did not rule on Semtek's request for leave to seek Rule 60(a) relief. Semtek then returned to the California district court, requesting it to indicate its willingness to entertain the motion to amend, but the court declined to hear the

3. The Decision Below.

With the case returned to the Maryland state court, Lockheed moved to dismiss on the basis of res judicata. *Accord* BIO 4 ("[F]or purposes of its motion to dismiss, Lockheed argued only that the California district court's dismissal precluded Semtek from filing the same claim in Maryland."). Lockheed asserted that the judgment in the California action had res judicata effect as a result of Federal Rule of Civil Procedure 41(b). In particular, Lockheed contended that the California judgment was "upon the merits" not merely in the sense provided by California law but also in the far more expansive sense of precluding Semtek's claims in another jurisdiction.

The Maryland trial court agreed with Lockheed that the dismissal of the California action was res judicata as a matter of federal law under "[t]he plain language of" Fed. R. Civ. P. 41(b). App. 38a-39a.

On appeal, Semtek urged the Maryland courts to follow *Dupasseur* v. *Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874). However, the Maryland Special Court of Appeals affirmed the dismissal, App. 1a-34a, and the Maryland Court of Appeals subsequently denied review, *id.* 35a.

SUMMARY OF ARGUMENT

I. In *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), this Court held that the res judicata effect of a federal diversity judgment "is such as would belong to judgments of the State courts rendered under similar circumstances." *Id.* at 135. During the ensuing century and a quarter, this Court has repeatedly reaffirmed *Dupasseur* and has never disavowed it. *Dupasseur* was built on a statutory jurisdictional framework that has remained unchanged. This Court should continue to adhere to *Dupasseur* as a matter of stare decisis. *Dupasseur* has proven to be a workable and reliable rule of judicial administration. In addition, *Dupasseur* promotes important values of federalism because it ensures that federal diversity courts will not run roughshod over the deliberate policy choices made by states regarding their respective laws of preclusion. *Dupasseur* reduces incentives for forum-shopping and avoids inequitable administration of the laws.

II. If this Court concludes, contrary to *Dupasseur*, that federal law rather than state law governs the res judicata effect of a limitations dismissal in diversity, the judgment below should nonetheless be reversed. This Court should rule that there is no important federal interest dictating the use of a nationally uniform rule governing the effect of a statute-of-limitations dismissal. Instead, as this Court has done with respect to other issues involving federal litigation of state-law claims where no federal statute or rule is explicitly controlling, this Court should hold that the federal common law rule here is one that *borrows* the pertinent state-law res judicata rule that would have applied if the case had been brought in, or had remained in, state court. Alternatively, this Court could adopt a uniform federal rule providing that a statute-of-limitations dismissal in a diversity case does not preclude suit in another forum with a longer limitations period, a rule mirroring state law in the vast majority of jurisdictions.

III. Federal Rule 41(b) does not require a contrary result. The Rule should not be interpreted as deciding the issue of the preclusive effect to which federal diversity judgments are entitled. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 4441, at 372-73 (1981 & 2000 Supp.) ("Wright & Miller"). Lockheed's interpretation of Rule 41(b) would allow each district court, in the exercise of its own discretion, to prescribe the preclusive effect of its own judgments. Far from achieving uniformity, Lockheed's proposed approach would only breed

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Rule 60(b)(6) motion. Record Excerpts at 671. In dicta, the California district court noted that it would have denied the Rule 60(b)(6) motion as untimely.

uncertainty, contrary to the principles of sound judicial administration and consistency that underlie the rules of civil procedure and the doctrine of res judicata.

Even if, as a general matter, Rule 41(b) governed the preclusive effect of a dismissal order, Rule 41(b) does not accord preclusive effect to the *type* of dismissal entered in this case: a dismissal under a statute of limitations. Controlling here is *Costello v. United States*, 365 U.S. 265 (1961), which excluded from the application of Rule 41(b) dismissals that are preliminary rather than on the merits. The Restatement of Judgments § 49, cmt. a (1942), which was cited by the Advisory Committee in its 1963 amendment of Rule 41(b), makes plain that Rule 41(b) was never intended to cover a statute-of-limitations dismissal.

Alternatively, if this Court were to hold that Rule 41(b) as a general matter addressed the preclusive effect of federal judgments, this Court should nonetheless hold that the phrase "upon the merits" must be determined under the law of the state in which the federal diversity court sits.

ARGUMENT

I. THE LAW OF THE FORUM STATE CONTROLS THE PRECLUSIVE EFFECT OF A FEDERAL DIVERSITY JUDGMENT.

The res judicata effect that must be given the judgments of state courts under the Full Faith and Credit Clause and the statute implementing and extending it, Art. IV, § 1, and 28 U.S.C. § 1738, has long been clear: the second forum must give the same res judicata effect as would the rendering state court.[5] *See Baker v. General Motors Corp.*, 522 U.S. 222, 233-35 (1998); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525-26 (1986). No similar constitutional or statutory provision expressly addresses the res judicata effect owed the judgments of federal courts, so that the rules in this area are ultimately set by this Court.[6]

[5] The term "res judicata" is used here in a broad sense to refer to the entire subject of the effect of a prior judgment in a subsequent action.

More than a century ago, this Court articulated a simple rule to be followed with respect to the res judicata effect of the judgment of a federal court sitting in diversity: the judgment has the same effect as if it had been rendered by a state court in that forum. This rule has never been rejected or modified; indeed, in recent decades this Court's res judicata decisions have been crafted so as to avoid altering this basic rule.

Under this principle, the judgment below should be reversed.

A. *Dupasseur* Should Be Reaffirmed As a Matter of Stare Decisis.

In *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), this Court held that the res judicata effect of a federal diversity judgment "is such as would belong to judgments of the State courts rendered under similar circumstances," and that "no higher sanctity or effect can be claimed." *Id.* at 135. This Court opined that it was not enough that under general common law principles the defendant in the Louisiana state-court litigation under review would not be considered in privity with the defendant who had lost the earlier Louisiana federal court diversity case. Rather, the Court examined "with some care" the

[6] *See* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1469, 1473-74 (4th ed. 1996); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 739-47, 753-55, 772-73 (1985); Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 315-27 (1993); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 984-89, 1005-08 (1998).

nature of Louisiana law concerning privity, *id.* at 135, and only after determining that there was nothing "peculiar in the Louisiana laws" which would support a finding of privity did the Court affirm the finding below that the earlier federal diversity judgment did not bind the defendant in the Louisiana state suit. *Id.* at 137.

In *Metcalf v. City of Watertown*, 153 U.S. 671, 676 (1894), this Court reaffirmed *Dupasseur*, stating that "[i]t cannot be doubted that . . . the judgment and decrees of" federal courts sitting in diversity "are entitled to the same sanctity and effect in the courts of each State, when those courts are held within the State, as their own judgments, nothing more, but nothing less."

In *Hancock National Bank v. Farnum*, 176 U.S. 640 (1900), this Court overturned the Rhode Island Supreme Court's attempt to apply its own res judicata law to shield one of its citizens from liability under a Kansas federal court judgment in a diversity case. In so doing, this Court reiterated again that the effect of the judgment is "not answered by referring to general principles of law . . . , but can be answered only by an examination of the decisions of the courts of Kansas." *Id.* at 643; *see also id.* at 644-45 ("what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered" and "[t]he fact that this judgment was rendered in a court of the United States, sitting within the State of Kansas, instead of one of the state courts, is immaterial").

The *Dupasseur* line of cases was left undisturbed in the following century, despite this Court's decisions in several cases in which it might easily have articulated a rule for the res judicata effect of federal court judgments that would displace *Dupasseur*.[7] Hence, *Dupasseur* has created a clear, predictable

[7] For example, in *Heiser v. Woodruff*, 327 U.S. 726, 731-33 (1946), involving the res judicata effect of a judgment in a federal question case, the Court carefully stated that it "need not consider whether . . . the rule of *res judicata* applied" in diversity cases "can be other than that of the state in which the federal court sits," and limited its analysis to reaffirming that "in non-diversity cases . . . the federal courts will apply their own rule of *res judicata*." *Id.* at 731-33 (citations omitted). In *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971), the Court reaffirmed its holding in *Heiser*, again making a narrow statement that as to res judicata, "[i]n federal-question cases, the law applied is federal law." *Id.* at 324 n.12. Lending support to the continued vitality of the *Dupasseur* line of cases, this Court noted that "[m]any federal courts, exercising both federal question and diversity jurisdiction, are in accord" in recognizing non-mutual collateral estoppel, "unless in a diversity case *bound to apply a conflicting state rule* requiring mutuality." *Id.* at 325 (emphasis added). *See also Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) (narrow statement that "[s]tate courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions in issues of *federal* law") (emphasis added).

rule that proved practical and administrable for over a hundred years. Even in the days of "general federal common law" of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *Dupasseur* recognized the virtue of a simple rule under which the res judicata effect of a state-law adjudication is uniform – exactly the same effect as a state court in the first forum would give it – regardless of whether the adjudication takes place in a state or federal court.

Lockheed suggested in the courts below that *Dupasseur* was simply an artifact of the Conformity Act of 1872, Ch. 255, 17 Stat. 196 (repealed 1948). That is untrue. Not once in *Dupasseur* or its progeny did this Court even mention the Conformity Act. Because res judicata is a matter of substance, not procedure, there is no reason to think that revisions in federal procedure, such as the adoption of the Federal Rules of Civil Procedure in 1938, have had an impact on the res judicata effect of a diversity judgment.

Authoritative scholarship has established that *Dupasseur* rested on substantive concerns rather than on the Conformity Act. *See* Burbank, *supra* note 6, at 741-46, 748-52. The statutory framework which *Dupasseur* and its progeny construed was not the Conformity Act but the statutes establishing the jurisdiction of the federal courts and laws setting out the

obligations of full faith and credit. *See, e.g.*, *Embry v. Palmer*, 107 U.S. 3, 9-10 (1883); *Metcalf v. Watertown*, 153 U.S. 671, 676 (1894); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 644-45 (1900); *Knights of Pythias v. Meyer*, 265 U.S. 30, 33 (1924); *Stoll v. Gottlieb*, 305 U.S. 165, 167, 170 & n.6 (1938).

Thus, the rule of *Dupasseur* was built on a statutory jurisdictional framework that has remained unchanged. This Court should therefore adhere to the rule of *Dupasseur* as a matter of stare decisis. "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Accordingly, this Court has said that it "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991).

Dupasseur involves precisely the sort of simple, black-letter rule where judicial consistency is important. Untold sessions of state legislatures have adopted statutes of limitations and other legislative measures against the background understanding that state law will govern their preclusive effect in federal litigation as well as in state court. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34-35 (1989) (Scalia, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., concurring in part and dissenting in part) (noting special stare decisis concerns where legislatures operate against background understanding created by prior judicial decisions); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988) (declining to alter longstanding choice of law principles against which many state statutes of limitations had been adopted).

Moreover, because *Dupasseur* and its progeny interpreted congressional enactments which have not changed in relevant part, stare decisis has added weight in this case. This Court has recognized that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for [there], unlike in

the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."[8] Any change in the rule of *Dupasseur* should therefore be made by Congress, not by this Court.

B. The Rule of *Dupasseur* Is Correct.

Even if *Dupasseur* had never been decided, basic principles of federalism and diversity jurisdiction would require the same result. The simple rule of *Dupasseur* ensures that the res judicata effect of a state-law judgment is always the same, whether the judgment is rendered by a state or federal court. Deviating from this rule would introduce a host of complexities, undermine principles of federalism, trigger forum shopping, and lead to inequitable administration of state law. When the court rendering the first decision is state rather than federal, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires use of the preclusion law that would apply in the rendering state's courts. For uniformity's sake the same preclusion law should govern whether the first action is in state or federal court.

This case provides a perfect illustration: If Semtek's first lawsuit had remained in California state court, there is no dispute that the Maryland courts would have decided the preclusive effect of the California judgment under state law rather than federal law, and that Semtek's suit would have been allowed to proceed in Maryland. Indeed, if the sequence of forums had been reversed – a California *state* court action followed by a Maryland *federal* court suit – it is common ground that, under Section 1738, the federal court would have been required to measure the preclusive effect of the California judgment under California

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[8] *Hohn v. United States*, 524 U.S. 236, 251 (1998) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989)); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 699-700 (1992) (adhering to statutory construction adopted in *Barber v. Barber*, 21 How. 582 (1859)); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting).

law.

1. Dupasseur *respects state policy choices concerning res judicata.* *Dupasseur* honors the ability of states to make deliberate choices regarding the scope of their respective laws of preclusion, without fear that their decisions will be overridden by federal courts. *See* Burbank, *supra* note 6, at 781-82, 794-97.

"For purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State.'" *Angel v. Bullington*, 330 U.S. 183, 187 (1947) (citation omitted). "Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996). Thus, the Rules of Decision Act, originally § 34 of the Judiciary Act of 1789, provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

Within the body of state law that federal courts are required to apply is the law of res judicata. "State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes." *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996). *See also Postal Tel. Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 475 (1918) ("[r]es judicata like other kinds of estoppel, ordinarily is a matter of state law"). Moreover, "the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace . . . .'" *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917); *see also Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (same).

There are important variations among the states on issues of preclusion law. For example, a number of states (including Alabama, Florida, Georgia, Kansas, Mississippi, North Dakota,

and Virginia) still retain the traditional mutuality requirement.[9] Ohio provides a limited public policy exception but generally adheres to the mutuality requirement.[10] "The states that require mutuality are fully aware that they are in the minority; their decision to retain the requirement is deliberate." Erichson, *supra* note 6, at 967. However, without *Dupasseur*, these variations in state law will be overridden when federal courts sit in diversity, because federal law no longer requires mutuality. *Blonder Tongue Labs. v. University of Ill. Found.*, 402 U.S. 313 (1971).

The same obliteration of state law will occur with respect to whether alternative holdings are entitled to issue preclusion (many federal courts give issue-preclusive effect to each alternative ground, while numerous states do not);[11] whether a judgment on appeal has preclusive effect (yes in the federal courts, no in California, Georgia, Oklahoma, Tennessee, and Washington);[12] the definition of a "claim" (federal courts

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[9] *See, e.g., Jones v. Blanton*, 644 So.2d 882, 886 & n.2 (Ala. 1994); *Stogniew v. McQueen*, 656 So.2d 917, 919-20 (Fla. 1995); Ga. Code Ann. § 9-12-40 (1993); *McDermott v. Kansas Pub. Serv. Co.*, 712 P.2d 1199, 1208-09 (Kan. 1986); *Walker v. Kerr-McGee Chem. Corp.*, 793 F. Supp. 688, 695-96 (N.D. Miss. 1992); *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992); *Angstadt v. Atlantic Mut. Ins. Co.*, 457 S.E.2d 86, 87-88 (Va. 1995). Louisiana did not recognize any issue preclusion at all until 1991 and apparently also requires mutuality. *See* La. Rev. Stat. Ann. § 13:4231.

[10] *See Cashelmara Villas, Ltd. Partnership v. DiBenedetto*, 623 N.E.2d 213, 215 (Ohio App. 1993).

[11] *Compare Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (CA7 1987), *with Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1475-76 (CA8 1994) (applying North Dakota law); *Arab African Int'l Bank v. Epstein*, 958 F.2d 532, 535 (CA3 1992) (applying New Jersey law); *Marathon Oil Co. v. Babbitt*, 938 F. Supp. 575, 579 & n.9 (D. Alaska 1996); *Vanover v. Kansas City Life Ins. Co.*, 438 N.W.2d 524, 526 (N.D. 1989); Restatement (Second) of Judgments § 27, cmt. i (1982).

[12] *Compare Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497-98 (CADC 1983), *with* Cal. Civ. Proc. Code § 1049 (West 1990); Ga. Code Ann. § 9-12-

generally apply a broad transactional test, while many states do not);[13] and whether a dismissal for failure to state a claim is treated as a judgment on the merits (it is generally not in California, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Minnesota, New York, and Oregon).[14]

Consider the situation where the state in which the federal diversity court sits follows a substantively based preclusion rule that differs from the preclusion rules developed in federal question cases. For example, a state rule might refuse nonmutual preclusive effect to judgments in mass disaster cases for reasons of substantive policy. If the scope of the federal diversity judgment is not defined by reference to this rule, the defendant will suffer a disadvantage in the second action by being precluded by an independent federal rule of nonmutual preclusion, whereas if the scope of the judgment in the first

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19 (1993); *Grider v. USX Corp.*, 847 P.2d 779, 784 n.1 (Okla. 1993); *McBurney v. Aldrich*, 816 S.W.2d 30, 34 (Tenn.. App. 1991); *Chau v. City of Seattle*, 802 P.2d 822, 825 (Wash. App. 1990).

[13] *Compare Apparel Art Int'l, Inc. v. Amertex Enters. Ltd.*, 48 F.3d 576, 583 (CA1 1995), *with Benetton S.p.A. v. Benedot, Inc.*, 642 So.2d 394, 399-402 (Ala. 1994); *Olsen v. Breeze, Inc.*, 55 Cal. Rptr.2d 818, 826-27 (App. 1996); *Takahashi v. Board of Educ.*, 249 Cal. Rptr. 578, 584-85 (App. 1988), *cert. denied*, 490 U.S. 1011 (1989); *American States Ins. Co. v. Walker*, 477 S.E.2d 360, 364 (Ga. App. 1996); *Torcasso v. Standard Outdoor Sales, Inc.*, 626 N.E.2d 225, 228-30 (Ill. 1993); *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 441-45 (Iowa 1996). *See generally* Howard P. Fink & Mark V. Tushnet, FEDERAL JURISDICTION: POLICY & PRACTICE 638 (2d ed. 1987) (discussing variations among the states in the definition of a "claim").

[14] *See Kanarek v. Bugliosi*, 166 Cal. Rptr. 526, 530 (App. 1980); *Gottlob v. Connecticut State Univ.*, No. CV 930521148S, 1996 WL 57087 (Conn. Super. Ct. Jan. 19, 1996); *Buie v. Waters*, 74 S.E.2d 883, 884-85 (Ga. 1953); *In re Estate of Cochrane*, 391 N.E.2d 35, 36 (Ill. App. 1979); *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721, 726 (Md. 1972); *Hacker v. Beck*, 91 N.E.2d 832, 834 (Mass. 1950); *H. Christiansen & Sons, Inc. v. City of Duluth*, 31 N.W.2d 277, 279-80 (Minn. 1948); *Amsterdam Sav. Bank v. Marine Midland Bank*, 528 N.Y.S.2d 184 (App. Div. 1988); *Briggs v. Bramley*, 177 F. Supp. 599, 600 (D. Or. 1959).

action is defined by state law, there would be no preclusion in the second action. Indeed, one could imagine that, in a jurisdiction where mutuality is required for collateral estoppel, a farseeing litigant could use Lockheed's rule deliberately to circumvent the state policy. By bringing a diversity case first, the litigant could obtain a judgment which then could be used for collateral estoppel purposes without the requirement of mutuality against the party the litigant wished to collaterally estop.

The risks to state law are not hypothetical. In *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1219-20 (Del. 1991), for example, the Supreme Court of Delaware refused to accord preclusive effect to a prior federal diversity judgment in Kansas because Kansas law does not recognize nonmutual issue preclusion: "precedent compels the application of state law when a federal court sitting in diversity is called upon to determine the preclusive effect to give a prior judgment. . . . [W]e view the preclusive effect to be given a prior judgment as an area of substantive law." Had the court applied Lockheed's approach, the outcome would have been different.

2. Dupasseur *avoids forum shopping and the inequitable administration of state law.* Without *Dupasseur*, a state-law judgment might mean one thing (for res judicata purposes) if rendered by a federal court and quite another if rendered by a state court. Accordingly, *Dupasseur* eliminates incentives for forum shopping and prevents the inequitable application of state law. *See* Burbank, *supra* note 6, at 767-68, 789-94.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), this Court held that a federal diversity court sitting in equity was required to apply a state statute of limitations: "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id.* In *Guaranty Trust*, the plaintiffs were barred from seeking recovery in a state court because the action was untimely under the statute of limitations. This Court held

that a federal court in equity could not take cognizance of the suit simply because there was diversity of citizenship between the parties.

Similarly, in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), this Court opined that diversity jurisdiction should not make a difference in determining whether a state statute of limitations applied to bar an action: "There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants." *Id.* at 753.

In this case, the question is analogous: whether a timely suit in Maryland that would not otherwise be precluded by a California judgment should be barred simply because there was diversity in the California action. *Guaranty Trust*, *Walker v. Armco Steel*, and other precedents demonstrate that the Maryland suit should not be barred. *See, e.g., Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 430-31 (1996) (*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), requires a federal district court, in ruling on new trial motion in diversity action, to apply New York statute regarding judicial review for excessive jury verdicts, rather than federal law standards: "Just as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court") (citation omitted); *Ferens v. John Deere Co.*, 494 U.S. 516, 523-28 (1990) (federal district transferee court must apply the state statute of limitations that the transferor court would apply, because under *Erie* a 28 U.S.C. § 1404(a) transfer should not change the state law applicable in a diversity case); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949) (when local law that creates the cause of action qualifies it, "federal court must follow suit," for "a different measure of the

cause of action in one court than in the other [would transgress] the principle of *Erie*").

While the principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), fortifies the rule of *Dupasseur*, the point is even more fundamental.[15] The goals of "discouragement of forum shopping and avoidance of inequitable administration of the laws" are rooted in the very nature of diversity jurisdiction. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). *Hanna* instructs federal courts to ask "whether application of the [State's] rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." 380 U.S. at 468 n.9. The policy against different outcomes on the basis of citizenship is a "policy of federal jurisdiction." *Guaranty Trust Corp. v. York*, 326 U.S. 99, 101 (1945). *See also Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980) ("The policies underlying diversity jurisdiction do not support such a distinction . . . .").

The rule of *Dupasseur* is necessary both to avoid opportunities for forum shopping and to prevent inequitable administration of state law. These dangers are illustrated by this very case. Lockheed removed the California action from the Los Angeles Superior Court to the federal district court in Los Angeles and then sought to transform a non-merits limitations dismissal into a judgment claiming full res judicata effect by

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[15] This Court has recognized the relevance of *Erie*-like principles to the rule of *Dupasseur*. *See Heiser v. Woodruff*, 327 U.S. 726, 731-32 (1946) (asking "whether, apart from the requirements of the full faith and credit clause of the Constitution, the rule of res judicata applied in the federal courts, in diversity of citizenship cases, under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64; cf. *Guaranty Trust Co. v. York*, 326 U.S. 99; *Holmberg v. Armbrecht*, 327 U.S. 392, can be other than that of the state in which the federal court sits").

misapplication of Rule 41(b). If the California action had not been removed to federal court (a removal which occurred only by the accident of diversity), the Maryland suit would have gone forward.

Dupasseur treats residents and non-residents equally by ensuring that the federal diversity judgment is governed by the preclusion law of the forum state, regardless of the citizenship of the parties. By contrast, under Lockheed's rule, a non-resident of the first forum state, who is able to remove the case to federal court and secure the application of federal preclusion law to the diversity judgment, is treated differently from a resident of the forum state. The out-of-state resident is permitted an option denied to the local resident. Yet this Court has cautioned that the "[a]vailability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens." *Angel v. Bullington*, 330 U.S. 183, 192 (1947); *see also Guaranty Trust*, 326 U.S. at 112 ("Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States.").

3. Dupasseur *respects the interests of the second forum state.* Lockheed's rule would invade the prerogative of the second forum (Maryland, in this case) to afford a plaintiff the opportunity to try her claims within the state's limitations period. Those interests are particularly strong where the earlier dismissal is based, as here, on limitations, which almost universally bars only the remedy and not the right. 18 Wright & Miller, *supra* § 4441 at 369; 18 MOORE'S FEDERAL PRACTICE ¶ 131.30[3][g][ii] (3d ed. 2000); Restatement (Second) of the

Conflict of Laws § 142(2) (1971). *See also Hauch v. Conner*, 453 A.2d 1207, 1214 (Md. 1983) ("With regard to the threshold matter of whether the court is open to a particular litigant, obviously the policy of the forum state is extremely important. . . . 'Access to forum courts is a matter for forum law to determine. . . . The forum's limitations rules represent its policy on the enforcement of stale claims, and a policy of repose may be relevant to all lawsuits filed in the forum's courts regardless of where the claims arose.'" (quoting Leflar, AMERICAN CONFLICTS LAW § 127, at 253 (3d ed. 1977)).

For example, Maryland has a particular interest in seeing that corporations incorporated in Maryland or having their principal place of business there, such as Lockheed, remain accountable in Maryland's courts if suit is filed within Maryland's limitations period. In fact, by its adoption of Maryland Rules of Court 2-101(b) and 3-101(b), Maryland has implemented "savings statutes" which afford a tolling of Maryland's statutes of limitations for any party who has filed an action elsewhere which has been dismissed under a shorter limitations period. These rules apply to a party who has filed suit in another state or U.S. district court – a suit that would be timely under the Maryland statute of limitations – and then finds itself dismissed under the non-Maryland tribunal's shorter limitations period. Such a party may timely refile the action in Maryland promptly after the entry of the foreign court's order, even though Maryland's statute of limitations would otherwise have expired.

Furthermore, there is no law providing that Maryland will "borrow" the shorter limitations period of another jurisdiction and use that period to bar an action untimely in the foreign jurisdiction. Maryland has a borrowing statute applicable only to products liability cases (Md. Code Ann. Courts and Judicial Proceedings § 5-115(b)), which shows that Maryland's legislature has considered the issue of differences in limitations periods in different jurisdictions and has affirmed Maryland's interest in permitting plaintiffs like Semtek to sue and in holding defendants like Lockheed accountable in Maryland courts if suit

is filed within Maryland's limitations period.

Lockheed's theory trumps Maryland's right to make that choice and closes the doors of the Maryland courts, contrary to that state's policy choice to afford a forum to plaintiffs like Semtek.

4. Dupasseur *respects the interests of the first forum state.* Lockheed's approach would also deprive the first forum of its interest in controlling the preclusive effect of a judgment concerning its law. For example, by California Code of Civil Procedure § 1908(a), the California legislature has dictated the effect of a judgment in an action applying California law in state court. To enable Lockheed to use the accident of diversity to accord greater preclusive effect to a dismissal pursuant to California's statute of limitations, than California would give a dismissal by one of its own courts, would in a sense entail hijacking California law. This effect flies in the face of the principle that "[t]he essence of diversity jurisdiction is that a federal court enforces State law and State policy. . . . [D]iversity jurisdiction must follow State law and policy." *Angel v. Bullington*, 330 U.S. 183, 191-92 (1947); *see also id.* at 192 ("A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.").

Under Lockheed's view, California would be compelled, should it wish not to adopt a statute of limitations with such a wide extraterritorial effect, to abandon the two-year statute of limitations altogether. Just as this Court has recognized that a federal court should not give a prior state court judgment greater preclusive effect than the state itself would give it, *see Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384 (1985); *Union & Planters Bank of Memphis v. Memphis*, 189 U.S. 71, 75 (1903), so too California has an interest in avoiding having the effect of its statute of limitations stretched beyond anything it intended. Indeed, such commandeering of California law is analogous to the forbidden commandeering of state legislative, executive, and judicial branches that this Court

condemned in *New York v. United States*, 505 U.S. 144 (1992), *Printz v. United States*, 521 U.S. 898 (1997), and *Alden v. Maine*, 527 U.S. 706 (1999).

5. *There is no federal interest that would warrant departing from* Dupasseur. As this case illustrates, the federal interest in affording preclusive effect to a diversity judgment is attenuated at best. This is not a federal question case. This is a diversity case in which the plaintiff never wanted to be in federal court and in which the second forum is not a federal but a state court. The plaintiff's subsequent filing in a state court does not tax federal judicial resources. The resources in question are those of the second court – here the courts of Maryland – which has made a decision not to borrow California's statute of limitations and instead to be available to a subsequent suit. "[T]he federal interest in enforcing a diversity judgment is not as significant as the federal interest in enforcing a federal-question judgment." Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 313-14 (1993); *see also* Burbank, *supra* note 6, at 778-97; *Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998) (federal interest in enforcing prior federal judgment does not create federal question jurisdiction).

There is no interest in "uniform" federal preclusion law that would justify abandoning *Dupasseur*. Variations in state law are the essence of federalism, not an "evil" to be corrected through the straitjacket of a single federal rule. As this Court explained in holding that federal courts must apply state choice of law rules:

> Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. . . . Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not

for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.

Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

Moreover, repudiating *Dupasseur* hardly ensures the development of a *uniform* federal approach. As one court opined in an analogous context in refusing to displace state law with federal common law, "there is no guarantee that the assumption of federal jurisdiction would result in a single position of the United States. There are hundreds of federal judges who could preside over similar cases and reach different conclusions, and there is no guarantee that a circuit split would be resolved by the Supreme Court." *In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 38 (D.D.C. 2000). Indeed, the federal courts of appeals are split over basic principles of preclusion law, such as offensive nonmutual issue preclusion. *See, e.g.*, 18 MOORE'S FEDERAL PRACTICE ¶ 132.04 (3d ed. 2000) (cataloguing cases). This Court rarely has the opportunity to grant review of, and resolve, these rather recondite preclusion issues. By contrast, the high courts in the several states are able to address conflicts in a more timely fashion. Therefore, following the preclusion law of the state in which the federal diversity court sat is a more efficient, administrable, and reliable system than relying on the development of a uniform federal preclusion law.

Critics of *Dupasseur* sometimes contend that the fact that federal law requires recognition of federal judgments mandates that federal rules of preclusion be used. That is a non sequitur. For example, federal law also determines what substantive law a diversity court applies, but mandates the use of state substantive law (28 U.S.C. § 1652), including state statutes of limitations, *Guaranty Trust Corp. v. York*, 326 U.S. 99 (1945), and state choice of law rules. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

Critics of *Dupasseur* also argue that it should be the

prerogative of the federal courts to determine the scope and effect of their own judgments. But in a diversity case, those judgments involve application of state law. A federal court is not "demeaned" by having the preclusive effect of its judgment determined by state law, when state law provides the rule of decision for the diversity judgment in the first place. In any event, the court which issues a judgment rarely has the opportunity to rule on its res judicata effect. *See, e.g.*, Advisory Committee Notes on Fed. R. Civ. P. 23, 1966 Amendments (referring to the "recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action").

In statute-of-limitations dismissals, there is ordinarily no significant federal interest in protecting litigants from having to relitigate the merits. Here, for example, the judgment in California was on a motion to dismiss, no discovery was conducted, and Lockheed was not put to the burden of presenting a defense. Allowing the Maryland action to proceed would not threaten a federal interest or any federal substantive right and would not interfere with federal procedure, because the case was not in federal court. Further, the California federal court never considered whether Semtek's lawsuit was timely under *Maryland* law. Hence, the basic aim of res judicata – to provide finality for matters that the parties "have had a full and fair opportunity to litigate," *Montana v. United States*, 440 U.S. 147, 153-54 (1979) – is not implicated here.

Therefore, under *Dupasseur*, Semtek should have been permitted to bring its claims in Maryland courts. The point is not that the California federal district court *erred* in dismissing and stating that its judgment was "on the merits" and "with prejudice." Semtek does not seek any *change* in the California federal judgment; the question is what that judgment *means*. Under California law, the phrases "on the merits" and "with prejudice" simply mean issue preclusion in the context of a statute-of-limitations dismissal. *See Gagnon Co. v. Nevada Desert Inn*, 289 P.2d 466, 472 (Cal. 1955) ("a mere statement

that a judgment of dismissal is 'with prejudice' is not conclusive. It is the nature of the action and the character of the judgment that determines whether it is res judicata."); *Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 807-08 (Cal. 1939) (disregarding "with prejudice" language in prior federal diversity judgment and affording that judgment no res judicata effect: "if the judgment is clearly not on the merits, the court's intention to make it a bar is immaterial. The words 'with prejudice' add nothing to the effect of a judgment in such a case, no matter what light they throw on the intention of the court"); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (CA9), *cert. denied*, 525 U.S. 963 (1998) ("California has emphasized the fact that the statute of limitations is a kind of procedural bar, and not one that relates to the merits of the case. In fact, California has pointed out that a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts.").

II. EVEN IF *DUPASSEUR* DID NOT CONTROL, FEDERAL LAW SHOULD PROVIDE THAT A STATUTE-OF-LIMITATIONS DISMISSAL BY A FEDERAL COURT GENERALLY DOES NOT BAR A SUBSEQUENT ACTION IN A DIFFERENT STATE.

If this Court concludes, contrary to *Dupasseur*, that federal law rather than state law governs the res judicata effect of a limitations dismissal in diversity, the judgment below should nonetheless be reversed.

A. Federal Law Would Borrow the Rule of the Forum State.

Even if the res judicata effect of a diversity judgment is governed by federal law, there is no important federal interest dictating the use of a nationally uniform rule governing the effect

of a statute-of-limitations dismissal. As this Court has done on other issues involving federal litigation of state-law claims where no statute or rule is explicitly controlling, this Court should hold that the federal common law rule here is one that *borrows* the pertinent state-law res judicata rule that would have applied if the case had been brought in, or had remained in, state court. Such an approach would reflect the philosophy that "although federal law must ultimately control the choice, federal law should at times apply state preclusion rules to federal judgments on state questions. This is the position adopted by the Restatement Second of Judgments." 18 Wright & Miller, *supra*, § 4472, at 734 (citing 1 Restatement (Second) of Judgments § 87 (1982)). *See also* Restatement (Second) of Conflict of Laws § 95 cmt. h (1988 rev.) ("When a federal judgment adjudicates claims under State law, State law, as a matter of federal law, may determine the effects of the judgment.").[16]

Borrowing state preclusion law in this context would retain much of the practical value of the *Dupasseur* rule in preventing the accident of a federal diversity forum from leading to a markedly different result from the one that would have obtained in state court. In so doing, this approach would help promote the strong federal interest in preventing the inequitable administration of the laws and in minimizing opportunities for outcome-determinative forum-shopping.[17]

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[16] It thus is no answer for Lockheed to assert that the res judicata effect of the California judgment is a matter of "federal law." "[K]nowing whether 'federal law governs' . . . does not much advance the ball. The issue in the present case is whether the California rule of decision is to be applied . . . and if it is applied it is of only theoretical interest whether the basis for that application is California's own sovereign power or federal adoption of California's disposition." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994) (holding that California law governs whether knowledge of corporate officers is imputed to corporation in California state law claim brought by FDIC).

[17] *See Semler v. Psychiatric Inst. of Washington, D.C., Inc.*, 575 F.2d 922, 927-928 & n.33 (CADC 1978) (Wilkey, J.) ("[T]he principles of *Erie* . . . and

This Court has often directed the borrowing of state-law rules in diversity cases. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *see also Ferens*, 494 U.S. at 532 (declining to fashion a federal common law of choice-of-law rules, because "state conflicts-of-law rules already ensure that appropriate laws will apply to diversity cases"). Of particular relevance here, in defining the applicable statute of limitations even for federal law claims where Congress has not addressed the matter, this Court has generally directed the use of the statute-of-limitations law of the forum state where compatible with federal interests, despite the substantial variations among fora caused by such borrowing.[18] If borrowing is appropriate in *federal question* cases, *a fortiori* it is warranted in the *diversity* context.

There is no evident basis for developing a uniform federal common law rule to determine the res judicata effect of a statute-of-limitations dismissal in a diversity case. A "significant conflict" between a federal policy or interest and state law is "normally a 'precondition'" before federal courts may "fashion

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the mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. § 1738 require a federal court exercising diversity jurisdiction in forum II to give to the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, at least in the absence of an overriding federal interest."); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1185 (CA4 1989) (Murnaghan, J., dissenting) (citing Restatement (Second) of Judgments § 20 cmt. n)); *cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (holding that federal courts should not allow use of offensive, nonmutual collateral estoppel where "application of offensive estoppel would be unfair to a defendant").

[18] *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 146-48 (1987); *id.* at 157-65 (Scalia, J., concurring in the judgment); *Wilson v. Garcia*, 471 U.S. 261, 266-71 (1985); *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158-62 (1983); *International Union* v. *Hossier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966); *Campbell* v. *Haverhill*, 155 U.S. 610, 614-15 (1895).

rules of common law," *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997) (citing *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994); *Wallis* v. *Pan Am. Petro. Corp.*, 384 U.S. 63, 68 (1966)), and "cases in which judicial creation of a special federal rule would be justified" are "'few and restricted.'" *O'Melveny & Myers*, 512 U.S. at 87 (quoting *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963)). In the great majority of cases in which no federal policy mandates the creation of uniform, judge-made federal common law, the Court will "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979).

Application of California law in this case would present no conflict, much less a "significant conflict," with a federal policy or interest. The cases in which the Court has found such a conflict all have involved federal causes of action or cases in which federal entities were parties, and even in those circumstances the Court generally borrows state law.[19] This case involves only private parties and no interference at all with the uniform application of any federal cause of action. The need for a uniform federal rule is further diminished by the state-law nature of the claims at issue. Indeed, it is particularly important in a system of federalism to take account of variations among the

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[19] *Compare United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) (federal law supplants "aberrant" and "hostile" state law intended to disadvantage federal policy regarding migratory birds) *with, e.g., Atherton v. FDIC*, 519 U.S. 213 (1997) (notwithstanding numerous federal policies identified by FDIC, application of state standards to conduct of officers and directors of federally insured depository institution does not create sufficient conflict with federal law to justify creation of general federal common law); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (state law imputing knowledge to FDIC officials does not conflict with federal banking policy sufficiently to justify creation of federal common law); *United States v. Kimbell Foods*, 440 U.S. 715 (1979) (asserted conflict between federal policy and state law governing priority of federal liens not sufficient to justify general federal common law).

states and to be solicitous of the collateral effects that a dismissal might have upon a cause of action created by a sovereign state such as Maryland.[20]

Lockheed's contention that a federal policy in favor of res judicata can be gleaned implicitly from federal law, including from the federal rules of civil procedure, is incorrect. *See* Part III, *infra*. It is also erroneous in any event because any such "implicit" policy is insufficient to justify creating federal common law in favor of borrowing state law. Congress and the drafters of the rules of civil procedure act "against the background of the total corpus juris of the states," recognizing that interstices in federal law will be filled by reference to state law. *Atherton*, 519 U.S. at 218. Accordingly, the failure of Congress and the drafters of the federal rules of civil procedure to announce a clear federal rule of preclusion is strong evidence that resort to state law is appropriate.

Finally, adoption of a uniform federal rule would be inappropriate because it would significantly undermine state interests. *E.g.*, *Board of County Commr's* v. *United States*, 308 U.S. 343, 351 (1939) (when federal policy leaves it to courts to determine rule of decision, "[n]othing seems to us more appropriate than [taking] due regard for local institutions and local interests"). In a closely analogous series of decisions –

[20] *See, e.g., O'Melveny & Myers*, 512 U.S. at 88 ("Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty – but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules." (citing *United States* v. *Yazell*, 382 U.S. 341, 347 n.13 (1966))); *International Union* v. *Hossier Cardinal Corp.*, 383 U.S. 696, 702 (1966) ("For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of [federal] labor policy."); *see also United States* v. *Kimbell Foods*, 440 U.S. 715, 730 (1979) (explaining that the Court's precedents "reject generalized pleas for uniformity as substitutes for concrete evidence" in determining whether a uniform federal common law standard must be adopted).

establishing a "settled practice" of borrowing a state statute of limitations period so long as it does not conflict with federal policy – this Court has emphasized that "federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson* v. *Garcia*, 471 U.S. 261, 267, 271 (1985). Lockheed would abrogate precisely that state interest in this case. *See also Bauserman* v. *Blunt*, 147 U.S. 647, 652-53 (1893) ("No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court.").[21]

B. If This Court Sets a Uniform Rule, It Should Adopt the Overwhelming Majority Rule that a Statute-of-Limitations Dismissal Does Not Preclude Suit in Another Forum.

If this Court does not borrow state law, a second available option would be simply to adopt, as a uniform federal common-law rule governing the res judicata effect of a statute-of-limitations dismissal, the traditional rule that such a dismissal does not preclude suit in another forum with a longer limitations period (at least so long as the rule of the rendering jurisdiction bars only a remedy in that jurisdiction's courts, and not the right itself). This is the rule adopted in the Restatement (Second) of

[21] The state interests raised by the statute of limitations cases also were considerably less substantial than here because the "borrowed" limitations were merely "analogous" to the federal claim in question. In this case, by contrast, the provision of state law to be borrowed – California's rule that a limitations dismissal does not bar an action in a different jurisdiction where suit is timely – without question is directly on point and was adopted to govern precisely a case such as this one.

the Conflict of Laws § 142(2) & cmt. g, § 143, and it is by far the majority rule. The leading federal court opinion articulating this traditional rule is Justice Story's opinion in *United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834). This rule has produced "the general conclusion that dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations." 18 Wright & Miller, *supra*, § 4441, at 369. *See also Townsend v. Jemison*, 50 U.S. (9 Cranch) 407, 413 (1850) ("The rule in the courts of the United States, in respect to pleas of the statutes of limitation has always been, that they strictly affect the remedy, and not the merits."); *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 46 (1949) (Frankfurter, J., dissenting) ("[W]here the enforcement of a judgment by State A is sought in State B, which has a longer limitation period than State A, State B is plainly free to enter its own judgment upon the basis of State A's original judgment, even though that judgment would no longer be enforceable in State A."); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722-23, 726 (1988) (noting long history of the view that the bar of the statute of limitations does not prevent subsequent suit in another jurisdiction).

III. RULE 41(B) DOES NOT REQUIRE A CONTRARY RESULT.

A. Rule 41(b) Should Not be Read as Deciding the Issue of the Preclusive Effect to Which Federal Diversity Judgments Are Entitled.

The court below rested its decision on Fed. R. Civ. P. 41(b). But the issue of the res judicata effect of a federal diversity judgment is not a question bound up in the particular procedures that a federal court uses in deciding cases. It is instead a matter lying outside the bounds of procedure. The question cannot be answered by simple reference to Fed. R. Civ. P. 41(b).

The meaning and applicability of Rule 41(b) in this context

has been analyzed by esteemed commentators, including Wright, Miller, and Cooper, who, after an in-depth analysis of the very problem presented here, conclude:

> As complex as these questions of limitations and preclusion are, one clear proposition can be advanced. Answers cannot be found in the provision of Civil Rule 41(b) . . . . Although some decisions have suggested that Rule 41(b) does provide an answer, the questions are too important to be resolved in this offhand manner. Here as elsewhere, Rule 41(b) need mean only that the dismissal precludes relitigation of the same limitations issues in the same court. Any greater effect should depend on independent analysis.

18 Wright & Miller, *supra*, § 4441, at 372-73. Numerous other scholars share the same view. *See* Burbank, note 6, *supra* at 782-83 ("[T]he Rules Enabling Act does not authorize Federal Rules of preclusion, and the rulemakers, with few exceptions, have not sought to state them. . . . [P]roperly viewed, Rule 41(b) merely states what other sources of federal law, of a nationally binding character, have the power to determine; it thus provides fair notice to litigants. Federal law standards are necessary to determine when a federal judgment can preclude subsequent litigation, whatever law governs the preclusive effects of that judgment.").[22]

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[22] Lilly, *supra* note 6 at 320-21 & n.113 (Federal Rules of Civil Procedure "probably" do not "operate directly to dictate their res judicata consequences in other courts" and "under one view, could not, without running afoul of the Enabling Act"); Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 COLUM. L. REV. 1505, 1524 (1985) ("The initial diversity judgment is entitled to the same preclusive effect that would be given to a judgment of a state court in its jurisdiction."); Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1937 n.11 (1991) ("a federal dismissal on the merits of claims cognizable in state court would appear inconsistent with the basic obligation to apply state substantive law").

The text of Rule 41(b) is terse and refers merely to "an adjudication upon the merits." The significance of a dismissal is determined not by the use of those few words but rather by the considerations of federalism and full faith and credit that are at stake. Indeed, the phrase "upon the merits" is now considered unhelpful and is not used in the Second Restatement of Judgments "because of its possibly misleading connotations." Restatement (Second) of Judgments § 19, cmt. a (1982). *See also* Stephen C. Yeazell, CIVIL PROCEDURE 828 (5th ed. 2000) ("This phrase conceals more than it explains, because it entirely begs the real question: For what reasons should we attach preclusive effect to a judgment?").

A further indication that Rule 41(b) does not answer the preclusion question raised here is the presence of the verb "operates" in the text of the Rule. The question presented here is: *where* does a dismissal subject to Rule 41(b) "operate" as "an adjudication upon the merits"? The answer cannot be found in Rule 41(b). Indeed, it would be odd to construe Rule 41(b) as supplying that answer for the *state* courts – in the sense of deciding the preclusive effect that a state court is required to give to a federal diversity judgment – because, by their very terms, the Federal Rules apply only to the *federal* courts. Rule 1 of the Federal Rules states: "These rules govern the procedure *in* the United States district courts . . . ." *See also* FRCP 82 ("These rules shall not be construed to extend or limit the jurisdiction of the federal courts."). The Rules Enabling Act, 28 U.S.C. § 2072, confers the power to make federal rules of practice "for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals," which rules "shall not abridge, enlarge or modify any substantive right." No federal decision has ever required a *state* court to apply the Federal Rules of Civil Procedure. *E.g., Rader v. Baltimore & O.R. Co.*, 108 F.2d 980, 986 (CA7), *cert. denied*, 309 U.S. 682 (1940) ("It is obvious that the rules can only have application to proceedings in the Courts of the United States, and can not be applied to the practice or procedure in State Courts, nor affect the rights of

parties in such Courts."); *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1279 (CA9 1980) ("Rule 41(b) cannot be invoked to assist the state judiciary in managing its business.").[23]

A dismissal "upon the merits" (or as the California federal court put it, "with prejudice"), in other words, is entitled to whatever preclusive effect it has under the law governing that effect. The question of the claim preclusive effect of a statute-of-limitations dismissal in an action in *another* jurisdiction is determined not by Rule 41(b) but rather by what Wright & Miller and the other noted commentators describe as a necessarily complex and sophisticated analysis. The question is not *issue* vs. *claim* preclusion, but rather the proper *scope* of claim preclusion – in particular, its impact on a subsequent action in another forum. Thus, the situation here is very much like a case raising a question of the applicability of the mutuality rule when a dismissal has occurred "on the merits." Lockheed concedes that in that instance the question of mutuality vel non is not answered by Rule 41(b). *See* BIO 14.

Rule 41(b) should not, and need not, be read to decide this important and difficult issue of federalism and full faith and credit. This Court has suggested that the Federal Rules of Civil

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[23] Although Rule 41(b) has been applied in situations where there have been successive *federal court* filings, here, of course, the second suit was filed in Maryland *state* court. *Reinke v. Boden*, 45 F.3d 166, 171 (CA7), *cert. denied*, 516 U.S. 817 (1995) ("Whatever might be the merit of this approach [to Rule 41(b)] in cases that involve successive suits in the federal courts — and there has been serious criticism — the rationale of these decisions cannot control our case. Unlike any of these cases, we do not have before us two successive federal suits. This difference is not a formalistic one. An intrasystem use of res judicata for dismissals on the ground of the expiration of a statute of limitations promotes judicial economy within that system. . . . In the context of the intersystem use of res judicata, however, the intent of the first forum to save the resources of the second cannot be so readily presumed. The first forum does not share the same interest in restricting the scope of its judgment because any subsequent suit will take place in the forum of another system.").

Procedure do not cover preclusion. *See Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) ("The federal rules on the subject of issue and claim preclusion . . . are 'almost entirely judge made.'" (quoting P. Bator, et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1598 (3d ed. 1988)). Although in *Hanna* this Court held that the outcome-determinative test of *Guaranty Trust* was not to be used to judge the validity of a Federal Rule, *Hanna* also opined that "in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, [a court] need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts . . . ." 380 U.S. at 473. The application of federal preclusion law may well make a dramatic difference to the course of the litigation, as this case illustrates, for variations between preclusion rules are "rarely nonsubstantial or trivial." Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 COLUM. L. REV. 1505, 1513 (1985).

Similarly, in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958), this Court indicated that a federal court should apply a state rule if it is "bound up with the definition of the rights and obligations of the parties." Here, preclusion law is intertwined with the parties' rights and obligations under the California statute of limitations. California has deliberately provided that a statute-of-limitations dismissal does not preclude suit in another state with a longer limitations period.

Hence, this Court should follow the established practice of "interpret[ing] the Federal Rules . . . with sensitivity to important state interests and regulatory policies" and "to avoid conflict with important state regulatory policies." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n. 7, 438 n.22 (1996). In *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-52 (1980), for example, this Court reaffirmed the decision in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), that state law rather than Rule 3 determines when a diversity action commences for the purposes of tolling the state statute of

limitations. In *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943), this Court held that Federal Rule 8(c) does not make contributory negligence an affirmative defense, but relates only to the manner of pleading. "The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply." *Id.* at 117.

Moreover, stretching Rule 41(b) to cover the preclusion issue presented by this case would not bring the simplicity and uniformity that Lockheed claims. "[T]he use and application of the phrase 'on the merits' has been imprecise at best." *Baris v. Sulpicio Lines*, 74 F.3d 567, 570 (CA5 1996), *judgment affirmed by an equally divided court*, 101 F.3d 367 (CA5 1996), *cert. denied*, 520 U.S. 1181 (1997). Even one of Lockheed's own counsel has acknowledged that the words "on the merits" "cannot be taken literally." Martin H. Redish, et al., CIVIL PROCEDURE: A MODERN APPROACH 1140-41 (3d ed. 2000). Thus, courts interpreting Rule 41(b) dismissals are frequently required to engage in substantial inquiry to determine the preclusive effect of the judgment.[24]

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[24] *E.g., In re Casse*, 198 F.3d 327, 333 (CA2 1999) ("The Order does not say with prejudice to what, although it could have done so, viz, 'with prejudice to any further filings under the Bankruptcy Code,' or 'with prejudice to any further filings under Chapter 11.' Accordingly 'with prejudice' may be regarded as ambiguous, as at least one other circuit has found when the phrase is used in a bankruptcy court's order." (citing *Colonial Auto Ctr. v. Tomlin*, 105 F.3d 933, 940 (CA4 1997)); *Kulinski v. Medtronic Bio-Medicus, Inc.*, 108 F.3d 904, 909 (CA8 1997) (dismissal for lack of jurisdiction "with prejudice" does not operate as an adjudication on the merits because, despite the label, the ruling did not reach the merits); *Reinke v. Boden*, 45 F.3d 166, 170-71 (CA7), *cert. denied*, 516 U.S. 817 (1995) (Minnesota rule stating that judgment was "on the merits" is not claim preclusive where the dismissal was on limitations grounds); *Brye v. Brakebush*, 32 F.3d 1179, 1185 & n.7 (CA7 1994) ("where doubt exists regarding the finality of a prior order of dismissal, the court may look beyond the words 'with prejudice' to determine if the dismissal was meant to be conclusive. . . . [T]o properly determine the preclusive effect of a prior judgment, the court not only may, but 'must inspect a judgment pleaded in bar, and if necessary explore the record, to ascertain

Indeed, far from achieving uniformity, Lockheed's proposed approach would only breed uncertainty, contrary to the principles of sound judicial administration and consistency that underlie the rules of civil procedure and the doctrine of res judicata. Lockheed wrongly assumes that Rule 41(b) establishes a blanket rule of preclusion, such that it renders all limitations dismissals in diversity res judicata. In reality, as the text of Rule 41(b) makes clear and as this Court held in *Costello v. United States*, 365 U.S. 265 (1961), dismissals under the Rule "operate as adjudications on the merits *unless the court specifies otherwise*." 365 U.S. at 285 (emphasis added). The rule thus is nothing more than a default provision addressing "non-specifying orders . . . of uncertain meaning." *Weissenger v. United States*, 423 F.2d 795, 799 (CA5 1970) (en banc) (citing *Costello*).[25] Accordingly, were this Court to adopt Lockheed's view that Rule 41(b) governs the preclusive effect of federal judgments of dismissal, it would leave district courts entirely free to deprive any dismissal order of res judicata effect simply by noting that the dismissal is "without prejudice." Indeed, for district courts located in jurisdictions that follow the common law, there is every reason to believe that federal district judges would follow the state rule in diversity cases and provide that such dismissals are without

what was determined by it.'"); *D'Angelo v. City of New York*, 929 F. Supp. 129, 135 (S.D.N.Y. 1996) ("Even where a dismissal is specifically 'on the merits' or 'with prejudice,' the circumstances must warrant barring the litigant from further pursuit of his claim in order for these phrases to be given preclusive effect.").

[25] That Rule 41(b) is merely a default rule is reinforced by Rule 41(a), which sets forth a similar default standard with an exception that expressly is withdrawn from the district judge's discretion. *See* FRCP 41(a)(1) ("*Unless otherwise stated in the notice of dismissal or stipulation*, the dismissal is without prejudice, *except* that a notice of dismissal operates an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim." (emphases added)); *see also* FRCP 41(a)(2) ("*Unless otherwise specified in the order*, a dismissal under this paragraph is without prejudice." (emphasis added)).

prejudice.[26] *Cf.* Justice Stone to Professor Frankfurter, *quoted in* C. Miller, THE SUPREME COURT AND THE USES OF HISTORY 13 (1969) ("I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid.").

The detrimental consequences that would follow from Lockheed's reading of Rule 41(b) are substantial. That rule applies to virtually all dismissals. Lockheed thus would grant district judges uncabined discretion to determine the res judicata effect of their own judgments not only for limitations dismissals in diversity cases but for *all* dismissals entered on *any* jurisdictional basis, whether diversity, federal question, or supplemental jurisdiction. As Lockheed acknowledges: "Under Rule 41(b), it is the rendering court that has the authority to determine the preclusive effect of its own statute of limitations dismissal (*as well as all other dismissals not specifically excepted from the scope of the rule*)." BIO 18-19 (emphasis

[26] In this very case, the California federal district court apparently intended that the dismissal merely prevent repleading and refiling of a complaint in California and not preclude the subsequent Maryland action. Although the court stated that its views were dicta and should not be cited to the Maryland courts (App. 71a n.17), the California district court explained in refusing to enjoin the Maryland action that its prior decision had rested on the California statute of limitations and "did not reach the substantive merits of Plaintiff's tort claims." App. 71a. The court opined that it would not bar "another proper forum" from "afford[ing] plaintiff another opportunity to fully litigate the merits of its causes of action" if that forum would not apply "a statutory or res judicata bar." *Id.* In fact, the district court opined that "it is not obvious to this Court that res judicata applies to bar Plaintiff's action in Maryland state court." *Id.* at 71a n.17. Thus, the facts in this case give rise to an inference that the court's orders meet Rule 41(b)'s "unless the court otherwise specifies" exception.

omitted and added).[27] The only dismissals that would be exempted are those expressly denominated "on the merits" in the rules of civil procedure themselves or that are expressly exempted in Rule 41(b) itself (i.e., "a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19").

It simply makes no sense to award district judges such discretion through the back door of Rule 41(b), as is plain from the fact that Lockheed's position would, ironically, *limit* the application of res judicata in those circumstances where this Court (as a matter of federal law governing federal claims) and states (as a matter of state law governing state claims) have determined that res judicata should apply. To take the simplest example, some states (although not California) agree with Lockheed that a statute-of-limitations dismissal should be res judicata in an action in another forum. But on Lockheed's view, a federal district court's dismissal under that state's law *might or might not* be res judicata, depending on whether the district court

[27] Lockheed's position in this regard could not be clearer. *See* BIO 4-5 (if the district court had "specif[ied] that the limitations dismissal was *not* on the merits [that] would mean that under the terms of Rule 41(b), it would not be treated as a merits adjudication with res judicata effect" (emphasis in original)); *id.* 11 ("Under *Hanna*, Rule 41(b) and not state law properly applied when the district court ruled that its limitations dismissal was 'with prejudice' and 'on the merits,' instead of specifying that its order should have no res judicata effect."); *id.* 16 (under Rule 41(b) "any other dismissal is 'on the merits' unless otherwise expressly provided" and in this case the district court did not "specify something less than claim preclusive effect"). Courts following Lockheed's view agree. *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 (CA2), *cert. denied*, 464 U.S. 936 (1983) ("It is clear that if, at the time of entry, the Washington judgment had been denominated 'without prejudice,' Rule 41(b) would have been inapplicable, and Harris could legitimately have reasserted its allegations in another jurisdiction."); *Weissenger v. United States*, 423 F.2d 795, 799 (CA5 1970) (en banc) (quoted in the text); *Sack v. Low*, 478 F.2d 360, 364 (CA2 1973) (Friendly, C.J.) (under Rule 41(b) "the District Judge may specify that his order be without prejudice").

elects to denominate the dismissal as "without prejudice." Because Rule 41(b) governs virtually all dismissals, Lockheed would also grant district judges the same discretion with respect to a federal court's dismissal of a federal antitrust suit not only on limitations grounds but on any number of other bases. The preclusive effect of such a judgment would reside within the discretion of the trial judge, a holding that conflicts directly with this Court's determination that merits dismissals on federal claims are res judicata without regard to discretionary considerations. *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398 (1981) ("There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." (citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877))).

There simply is no basis for displacing the clear and settled rules of res judicata and preclusion adopted by California and Maryland (and the forty-eight other states) in favor of such a policy (if it can be called that) of substantial indeterminacy, thereby depriving litigants of any way of knowing ex ante the res judicata effect that will attend the dismissal of almost any action. To the contrary, such a ruling would conflict with this Court's repeated holding that res judicata, when applicable, is virtually a per se rule, not amenable to loose discretionary determinations by the judiciary. "'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Moitie*, 452 U.S. at 401; *see also United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) (distinguishing the "uniform rule" of res judicata from the "discretionary rule of practice" of the law of the case doctrine); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924) (describing res judicata as an "inflexible doctrine");

Southern Ry. Co. v. Clift, 260 U.S. 316, 319 (1922) (distinguishing law of the case, which "directs discretion," from res judicata, which "compels judgment").

By itself, this difference in character between Rule 41(b) and the nature of res judicata reinforces the conclusion that Rule 41(b) was not intended to create a federal law of preclusion. It is no answer to say that district judges would not necessarily have unfettered discretion in determining whether to give their dismissals res judicata effect but instead could be guided by principles of federal law. At the very least, numerous disputes would arise on appeal regarding whether the district court should have exercised its discretion under Rule 41(b) to deviate from the applicable federal standard. But, even more importantly, if Lockheed's position requires looking beyond the text of Rule 41(b) to a background principle of federal law, Lockheed cannot prevail. As we explain at length in Part I, *supra*, that principle is supplied by *Dupasseur* and its progeny, which hold that the res judicata effect of a judgment is determined by the law of the forum state. Lockheed cannot plausibly maintain that *Dupasseur* has been supplanted by Rule 41(b) while simultaneously arguing that Rule 41(b) requires reference to precisely the background principles that *Dupasseur* has long provided.

Alternatively, if this Court were to hold that Rule 41(b) as a general matter addressed the preclusive effect of federal judgments, this Court should nonetheless hold that the phrase "upon the merits" must be determined under the law of the state in which the federal diversity court sits. In this case, California law provides that a statute-of-limitations dismissal does not preclude a subsequent action in a different forum and therefore is not "upon the merits."

B. Rule 41(b) Does Not Accord Preclusive Effect to a Statute-of-Limitations Dismissal.

Even if, as a general matter, Rule 41(b) governed the preclusive effect of a dismissal order, Rule 41(b) does not accord

preclusive effect to the *type* of dismissal entered here: a dismissal under a statute of limitations. Controlling here is *Costello v. United States*, 365 U.S. 265 (1961), which excluded from the application of Rule 41(b) dismissals that are preliminary rather than on the merits.

Costello involved two denaturalization complaints filed by the government alleging that the petitioner had filed a fraudulent petition for naturalization. This Court invalidated the government's first complaint because it was not accompanied by a statutorily required affidavit of good cause. 356 U.S. 256 (1958). On remand, the government argued that the complaint should be dismissed "without prejudice," but the district court ordered dismissal without further elaboration. *See* 365 U.S. at 268. The government then filed a second complaint and prevailed on the merits. When the case returned to this Court for the second time, the petitioner argued that the first judgment of dismissal was res judicata as to the second complaint, relying on *precisely* the theory that Lockheed invokes in this case – viz, "that the second denaturalization proceeding was barred under Rule 41(b) of the Federal Rules of Civil Procedure by the failure of the District Court on remand of the first proceeding to specify that the dismissal was 'without prejudice' to the filing of a new complaint." 365 U.S. at 268.

This Court rejected the petitioner's argument, holding that the dismissal of the first complaint was "a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b)." 365 U.S. at 285. The Court refused to read into the language of Rule 41(b), which does not either in its text or in the accompanying advisory notes evidence an intent to change the law of res judicata, "a purpose to change" the rule that governed res judicata before the adoption of the Federal Rules of Civil Procedure – the "common-law principle" that "dismissal on a ground not going to merits was not ordinarily a bar to a

subsequent action on the same claim." 365 U.S. at 285-86.[28] To the contrary, "[a]ll of the dismissals enumerated in Rule 41(b) which operate as adjudications on the merits – failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law – primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them." *Id.* The Court therefore logically "confine[d]" the rule's application "to those situations where the policy behind the enumerated grounds is equally applicable," i.e., to cases in which "the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits." *Id.* at 287. In particular, the Court read the "jurisdictional" exception to Rule 41(b) to encompass those dismissals in which the district court did not exercise its "jurisdiction" to reach the merits of the case, and rejected as "misconceive[d]" the petitioner's contention that the exception is limited "to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter." *Id.* at 285.

Costello forecloses Lockheed's argument under Rule 41(b). If a district court holds, as in this case, that a complaint has been filed outside one state's statute of limitations, the court's order of dismissal is "for lack of jurisdiction" for the purposes of Rule 41(b). The statute of limitations is manifestly "a ground not

[28] Under the common law, the Court explained, "'there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit.'" *Costello*, 365 U.S. at 285 (quoting *Haldeman v. United States*, 91 U.S. 584, 585-86 (1875)). If the suit was instead "'disposed of on *any ground* which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.'" *Id.* at 286 (emphasis added) (quoting *Hughes v. United States* 71 U.S. (4 Wall.) 232, 237 (1866)).

going to merits" and dismissal on that basis pretermits not only the court's examination of the merits but also any burden on the defendant to prepare a defense. *See Costello*, 365 U.S. at 285-87. Just as important, neither the text of Rule 41(b) nor the accompanying Advisory Committee Notes evidence an intent to supplant the long-settled holding of *Dupasseur* and its progeny that the effect of a statute-of-limitations dismissal is governed by the forum state's law. *See* Part I, *supra*. *Accord Burgess v. Cohen*, 593 F. Supp. 1122, 1124 (E.D. Va. 1984) ("Rule 41(b) was not intended to include a dismissal on limitations grounds as an unqualified decision upon the merits" (citing *Costello*)).

Since 1961, when *Costello* was decided, Rule 41 has been amended five times. None of those amendments altered the "jurisdictional" exception or otherwise called *Costello* into question. Indeed, in 1963, Rule 41(b) was amended to add dismissal "for lack of an indispensable party" to the list of dismissals withdrawn from the district court's discretion. Relevant for present purposes, the 1963 amendment's Advisory Committee notes explain: "Such a dismissal does not bar a new action, for it is based merely 'on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.' *See Costello v. United States*, 365 U.S. 265, 284-88 (1961); *Mallow v. Hinde*, 12 Wheat. (25 U.S.) 193 (1827); Clark, CODE PLEADING 602 (2d ed. 1947); Restatement of Judgments § 49, comm. a, b (1942)."

The cited portion of the Restatement of Judgments, in particular comment a to Section 49, indicates beyond a shadow of a doubt that Rule 41(b) was not intended to cover a statute-of-limitations dismissal:

> A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to maintain an action in the State in which the judgment is rendered and not on a ground which would be applicable to an action in other States. In such a case the judgment is on the merits to the extent that it will bar the plaintiff from maintaining

> a further action in that State, but it is not on the merits so far as actions in other States are concerned. Thus, if the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. He is not, however, precluded from maintaining an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State.

Restatement of Judgments § 49, cmt. a (1942); *see also Western Coal & Min. Corp. v. Jones*, 167 P.2d 719, 724 (Cal. 1946) (quoting § 49, cmt. a, at length and setting forth California's policy that "a judgment determining that an action is barred by the statute of limitations is not one on the merits and therefore is not res judicata" because "the running of the statutory period does not extinguish the cause of action, but merely bars the remedy").

The Advisory Committee's reference to comment a of Section 49 of the Restatement in the context of Rule 41(b) is highly revealing. "[I]n ascertaining [the Rules'] meaning the construction given to them by the Committee is of weight." *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946); *see also Torres v. Oakland Scavenger Corp.*, 487 U.S. 312, 316 (1988); *Schiavone v. Fortune*, 477 U.S. 21, 30 (1986). Accordingly, even if Rule 41(b) as a general matter addressed the preclusive effect of federal judgments, it would not accord preclusive effect to a statute-of-limitations dismissal.[29]

[29] Well-reasoned decisions of the courts of appeals have long attested to the broad scope of Rule 41(b)'s "jurisdictional" provision in light of *Costello*. *Pack v. Yusuff*, No. 99-60283, 2000 U.S. App. LEXIS 15843, at *17 (CA5 July 10, 2000) (holding that dismissal with prejudice should be limited to preliminary jurisdictional issue reached by district court); *In re Swine Flu Immuniz. Prods. Liab. Litig.*, 880 F.2d 1439, 1441 (CADC 1989) (a dismissal may be "jurisdictional" "in the sense that it prevents the court from reaching the merits of the complaint, and not in the sense that it would be no bar to that plaintiff bringing a later case"); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 680 n.18 (CA5 1985) ("Because of the obvious effects that accompany a dismissal with prejudice, the line between on-the-merits adjudications and those based on jurisdictional defects must lean towards a broader definition of 'jurisdictional' under Rule 41(b)."); *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233 (CA8 1981) (explaining that Costello holds that "the term jurisdiction and rule 41(b) should not be interpreted in a rigid and narrow manner" and therefore encompasses dismissals for lack of standing); *Knox v. Lichtenstein*, 654 F.2d 19, 22 (CA8 1981) ("If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceeding, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered should not bar another suit."). Although some courts disagree, those decisions have been the subject of appropriate criticism. *See Sack v. Low*, 478 F.2d 360, 363 (CA2 1973) (Friendly, C.J.) (criticizing Second Circuit authority according limitations dismissal res judicata effect based on Second Circuit precedent from 1930s and the 1949 Restatement of Judgments, under which "dismissal on that ground represented only a determination that the particular remedy the plaintiff had sought to pursue was unavailable, leaving him free to seek to enforce the right in another forum if the limitations of that forum allowed," and which "is still the general rule"); *see also Criales v. American Airlines*, 105 F.3d 93, 95 (CA2 1997) (more recent Second Circuit decision reading *Costello* broadly and collecting cases in support of that view).

The facts of this case illustrate perfectly that statute-of-limitations dismissals fall squarely within *Costello*'s rationale and holding. In response to Semtek's California state court complaint, Lockheed immediately removed to federal court and, within days, moved to dismiss on the basis of the applicable California statute of limitations. Not only was Lockheed not put to the burden of preparing a defense but the parties never conducted any discovery or factual development at all. To the contrary, as Lockheed explained in its brief in opposition, "Semtek's own complaint and representations established that California's two-year statute of limitations had expired." BIO 2. It is equally clear that, in granting Lockheed's motion, the district court did not consider the merits of Semtek's claims, as

Lockheed sought dismissal on only a single basis – expiration of the statute of limitations. *See Koch v. Rodlin Enters., Inc.*, 223 Cal. App.3d 1591, 1596 (App. 1990) ("Termination of an action by a statute of limitations is deemed a technical or procedural, rather than a substantive, termination. 'Thus the purpose served by dismissal on limitations grounds *is in no way dependent on nor reflective of the merits* – or lack thereof – in the underlying action.' (quoting *Lackner v. LaCroix*, 25 Cal.3d 747, 751-52 (1979), and citing additional California authorities) (emphasis added)).

Accordingly, under *Costello*, Rule 41(b) does not deem the California district court's dismissal of Semtek's complaint to be res judicata as to Semtek's Maryland action. Instead, applying *Dupasseur*, the Maryland courts should have looked to California law, which would hold that the limitations dismissal does not bar another suit by Semtek in another jurisdiction.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Full Faith and Credit Clause, Art. IV, § 1, provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Full Faith and Credit statute, 28 U.S.C. § 1738, provides in relevant part:

> . . . The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Federal Rule of Civil Procedure 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and

any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.