

February 2019

Removal Without Approval? Corporate Litigative Authority to Consent to Federal Removal Where Adverse Parties Are Co-Equal Shareholder Co-Directors

James M. McClure

Follow this and additional works at: <https://scholarship.law.wm.edu/wmblr>



Part of the [Civil Procedure Commons](#), and the [Jurisdiction Commons](#)

Repository Citation

James M. McClure, *Removal Without Approval? Corporate Litigative Authority to Consent to Federal Removal Where Adverse Parties Are Co-Equal Shareholder Co-Directors*, 10 Wm. & Mary Bus. L. Rev. 517 (2019), <https://scholarship.law.wm.edu/wmblr/vol10/iss2/6>

Copyright c 2019 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmblr>

REMOVAL WITHOUT APPROVAL? CORPORATE LITIGATIVE AUTHORITY TO CONSENT TO FEDERAL REMOVAL WHERE ADVERSE PARTIES ARE CO-EQUAL SHAREHOLDER CO-DIRECTORS

JAMES M. MCCLURE*

ABSTRACT

The Case of Swart v. Pawar involved a novel question of law: can a president of a corporation claim authority on behalf of that corporation to consent to federal removal in a suit against a co-equal shareholder co-director even though that president lacks board approval or explicit authority from the business's bylaws or charter? To address this question, the parties in Swart analogized removal to suit initiation and defense. Since the federal courts hearing the case did not assess the validity of these analogical arguments or a president's removal authority generally, this Note evaluates the analogies as well as several solutions to the underlying question. The analogy of suit initiation and defense to removal proves to be somewhat useful given the actions' relatively close relationship in the diversity context as well as the fact that courts have not distinguished between corporate presidential authorities to bring and defend suit. However, there are considerable differences between suit initiation, defense, and removal. An initiation-defense-removal analogy accordingly fails to fit perfectly with potential solutions arising from relevant case law. Ultimately, this Note suggests that courts could consider a different approach to addressing removal authority: discard the analogy and permit presidents to defend suit in a corporate emergency without recognizing an expansive presidential authority to remove to federal court without board consent.

* JD Candidate, 2019, William & Mary Law School; BA, 2016, University of Virginia. The author would like to thank his father, Mr. James T. McClure, and Mr. Paul J. Harris for their guidance on the case at the heart of this Note. He would also like to acknowledge the *William & Mary Business Law Review* staff and editors for their considerable efforts in preparing the Note for publication.

TABLE OF CONTENTS

INTRODUCTION: A NASTY BUSINESS.....	519
I. INCONSISTENT CONCLUSIONS? AN IN-DEPTH LOOK AT SWART'S QUESTION OF REMOVAL IN THE DISTRICT AND CIRCUIT COURTS	523
<i>A. The District Court Holdings on the Motions for Summary Judgment</i>	<i>523</i>
<i>B. Arguments on Appeal: The Authorities to Bring Suit, Defend Suit, and Consent to Removal.....</i>	<i>526</i>
II. THE ANALOGY OF REMOVAL TO SUIT INITIATION AND DEFENSE	529
<i>A. The Analogy in Diversity</i>	<i>530</i>
<i>B. The Analogy in the Context of Swart's Corporate Dispute.....</i>	<i>533</i>
III. FILLING IN THE GAPS: APPLYING ... AND RETHINKING THE INITIATION-DEFENSE-REMOVAL ANALOGY.....	537
<i>A. A Problematic Proposition: Pawar Possessed Authority to Remove Suit in an Emergency Situation Against Swart as President of MRA</i>	<i>538</i>
<i>B. A Second Flawed Solution: Pawar Could Not Consent to Removal on Behalf of MRA Because He Lacked Implied Authority to Initiate and Defend Suit Against a 50% Co-equal Shareholder</i>	<i>541</i>
<i>C. Rethinking the Initiation-Defense-Removal Analogy's Role in Presidential Authority.....</i>	<i>544</i>
CONCLUSION	546

INTRODUCTION: A NASTY BUSINESS

Reflecting on the tendencies of judges, Judge Richard A. Posner remarked: “Because Americans admire pragmatism, and because district judges can do a lot with their discretionary powers, they may come to feel—in most circumstances, I believe, unconsciously—that their job is to ‘get things done’”¹ A recent case out of the Northern District of West Virginia, *Swart v. Pawar*, lends some credence to Judge Posner’s suspicion that “getting things done” can leave, or at least reflect, ambiguities in the law.²

Swart v. Pawar stemmed from a dispute between two radiologists, Drs. Stephany Swart (Swart) and Surendra Pawar (Pawar), who jointly owned a corporation for their practices, Monongalia Radiology Associates, P.C. (MRA).³ Incorporating under Pennsylvania law in 2008, Pawar and Dr. Terre Popovich began to operate the corporation at Monongalia General Hospital (MGH) in Morgantown, West Virginia, its principal place of business.⁴ When Swart joined the group in September of the same year as a part owner and secretary of the board, each doctor held a thirty-three percent stake of MRA.⁵ Dr. Popovich, the board’s treasurer, quickly left MRA, leaving Pawar and Swart as co-equal fifty percent shareholders and co-directors.⁶ After Popovich departed, Pawar retained his position as president of MRA while Swart kept her secretary position and assumed the vacated position of treasurer.⁷

¹ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 340 (1996).

² *Swart v. Pawar*, No. 1:14-CV-10, 2015 WL 8056115, at *1 (N.D.W.V. Dec. 4, 2015), *aff’d per curiam*, 684 F. App’x 306 (4th Cir. 2017), *cert. denied*, No. 17-167, 2017 WL 3324960 (2017); *see* POSNER, *supra* note 1, at 340.

³ *Swart v. Pawar*, No. 17-167, 2015 WL 7430795, at *1 (N.D.W.V. Nov. 19, 2015). It should be noted that the District Court of the Northern District of West Virginia held two separate hearings on portions of cross-motions for summary judgment: *Swart*, 2015 WL 7430795, at *1 and *Swart*, 2015 WL 8056115, at *1. This Note will primarily focus on the former, as the latter does not address the procedural matters of interest.

⁴ *Swart*, 2015 WL 7430795, at *1–2.

⁵ *Id.* at *2.

⁶ *Id.*

⁷ *Id.*

For the following three years, MRA's two owners enjoyed a turbulent coexistence.⁸ One problem arose over MRA's finances.⁹ The corporation contracted with an accounting firm to manage its accounting affairs, including pay disbursements, expense reimbursements, and tax filings.¹⁰ MRA's bylaws stated that the treasurer of the corporation "shall 'have custody' of the company's funds, keep accurate accounts, deposit all corporate monies, and disburse funds as ordered by the Board" while also specifying that the board of directors would determine the proper methods of inspecting the corporate books.¹¹ In early 2011, Swart began to request reviews of the corporation's financial information, and the accounting firm, on the advice of its attorney, refused to provide the information without Pawar's consent.¹² When Swart approached Pawar, the president said that she could only review the information by signing a confidentiality agreement.¹³ Swart claimed that she never received this agreement and subsequently did not review the records, later arguing that she, as treasurer, need not do so.¹⁴

Other disagreements arose over the corporation's contract with MGH.¹⁵ This contract mandated that MRA hire additional physicians to bolster the hospital's radiological services.¹⁶ In 2009, MRA hired Dr. Eric Johnson, a radiologist whom Pawar fired in 2011.¹⁷ Over Swart's protests that a second candidate was unfit to join the corporation, Pawar unilaterally signed an employment contract for that physician in December 2010.¹⁸

By the end of 2011, MGH determined that the doctors' relationship had devolved to the point where they could no longer satisfactorily operate the firm and hire additional doctors according

⁸ For an in-depth summary of the facts surrounding the breakdown of Swart and Pawar's professional relationship, see *id.* at *3–7. This Introduction intends to give some context to the case's claims and counterclaims, but the stated facts are not comprehensive.

⁹ *Id.* at *5, *7.

¹⁰ *Id.* at *5.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at *5.

¹⁴ *Id.*

¹⁵ See *id.* at *2–4, *7.

¹⁶ *Id.* at *3–4.

¹⁷ *Id.* at *3.

¹⁸ *Id.* at *4.

to the terms of MRA's contract with the hospital.¹⁹ MGH terminated its contract with MRA on December 31, 2011.²⁰

The years of intra-corporate discrepancies culminated in 2013 when Swart filed suit in Monongalia County Circuit Court.²¹ In her complaint, the radiologist asserted claims against Pawar, MRA, the accounting firm, an employee of the accounting firm, and the accounting firm's attorney, alleging: "(1) fraud against all defendants, (2) breach of fiduciary duty against all defendants, (3) conversion against Pawar only, (4) legal malpractice against [the accounting firm's attorney] only, and (5) accounting malpractice against the [accounting firm] and [the employee of the accounting firm]." ²² In their answer, Pawar and MRA pleaded and alleged several counterclaims against Swart.²³

However persuasive any of these claims may have been on the merits, the parties' early posturing presented the case's novel and largely unresolved issue at the intersection of corporate law and civil procedure: removal authority in a suit against a co-equal shareholding co-director.²⁴ After Swart filed suit, the accounting firm's attorney filed a notice of removal.²⁵ In the notice, he included notices of consent from all defendants.²⁶ Swart then moved to remand for lack of diversity jurisdiction and lack of unanimous consent to federal removal, a requirement of the removal statute, 28 United States Code Section 1446.²⁷ The district court denied

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at *8.

²² *Id.*

²³ *Id.* at *8 (MRA and Pawar alleged breach of fiduciary duty; MRA alleged breach of contract and contractual interference; and Pawar alleged interference with a prospective contract as well as fraud and misrepresentation.).

²⁴ *See, e.g., id.* at *8–9, *13. *See generally* Swart v. Pawar, 684 F. App'x 306 (4th Cir. 2017).

²⁵ Swart, 2015 WL 7430795, at *8.

²⁶ *Id.*

²⁷ *See Swart*, 684 F. App'x at 306 (mentioning the motion to remand on the grounds of lack of unanimous consent); Swart, 2015 WL 7430795, at *8 (mentioning the motion to remand on the grounds of a lack of diversity). The district and circuit court opinions differ in the reasoning for filing the motion to remand. The appellate court only mentions the lack of unanimous consent, the key issue on appeal. *See Swart*, 684 F. App'x at 306. The district court fails to mention this reason for remand at all in the November order granting

the motion to remand,²⁸ and this question of removal authority would become the cornerstone of the case's appeal to the Fourth Circuit and denied petition for a writ of certiorari from the United States Supreme Court.²⁹

This Note will address the removal question at the heart of this case.³⁰ Part I will discuss the relevant district court opinions in *Swart*,³¹ and then use the appellate analogical arguments of *Swart* and *Pawar* to highlight the missing reasoning of the district court's rulings that the Fourth Circuit subsequently affirmed.³² Part II will consider the case's suit initiation-defense-removal analogy, concluding that it is an imperfect, yet somewhat useful, means of generally evaluating the authority to remove to federal court given the nature of diversity removal and corporate presidential authority.³³ Part III will use cases from varying jurisdictions to present the strengths and weaknesses of analogy-driven resolutions to this question of removal authority,³⁴ suggesting that the optimal resolution could require a departure from the analogy.³⁵

summary judgment, addressing only the claim of lack of diversity jurisdiction. *Swart*, 2015 WL 7430795, at *8. However, *Swart*'s Memorandum in Support of the Motion to Remand asserted both a lack of diversity jurisdiction and a lack of unanimous consent. See Memorandum in Support of Motion to Remand at 1–6, *Swart v. Pawar*, No. 1:14-CV-10 (N.D.W.V. Feb. 14, 2014), ECF No. 13.

²⁸ See Summary Order Following Scheduling Conference at 2, *Swart v. Pawar*, No. 1:14-CV-10 (N.D.W.V. Feb. 14, 2014), ECF No. 30 (“DENIED the motion to remand (dkt. no. 12) ...”).

²⁹ See generally Petition for Writ of Certiorari, *Swart v. Pawar*, 2017 WL 3327809 (2017) (No. 17-167); Corrected Brief of Appellant, *Swart v. Pawar*, 684 F. App'x 306 (4th Cir. 2017) (No. 15-2519).

³⁰ See, e.g., Corrected Brief of Appellant, *supra* note 29, at 1 (naming this matter as the first issue in the “Statement of the Issues” on appeal).

³¹ See *infra* Section I.A.

³² See *infra* Section I.B.

³³ See *infra* Part II.

³⁴ The District Court for the Northern District of West Virginia applied Pennsylvania law. See *Swart v. Pawar*, No. 17-167, 2015 WL 7430795, at *11 (N.D.W.V. Nov. 19, 2015). The application of Pennsylvania law, rather than West Virginia law, was a contested issue at the district court and circuit court levels. See Corrected Brief of Appellant, *supra* note 29, at 1; *Swart*, 2015 WL 7430795, at *10–12. However, this Note will only consider removal authority under Pennsylvania law when assessing the removal reasoning of the respective courts since the case's choice of law dispute did not present any novel issues of law. See, e.g., *Swart*, 2015 WL 7430795, at *11.

³⁵ See *infra* Part III.

Finally, the Conclusion will reiterate these findings and arguments in the context of *Swart*.³⁶

I. INCONSISTENT CONCLUSIONS? AN IN-DEPTH LOOK AT *SWART*'S
QUESTION OF REMOVAL IN THE DISTRICT AND CIRCUIT COURTS

A. *The District Court Holdings on the Motions for Summary
Judgment*

On April 22, 2014, the United States District Court for the Northern District of West Virginia denied Swart's motion to remand for lack of jurisdiction and lack of unanimous consent to removal.³⁷

³⁶ See *infra* Conclusion.

³⁷ See *Swart v. Pawar*, 684 F. App'x 306, 307 (4th Cir. 2017); *Swart*, 2015 WL 7430795, at *8. The United States Supreme Court first announced the "rule of unanimity" in *Chi., Rock Island & P. Ry. Co. v. Martin*. See *Chi., Rock Island & P. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900) (concluding that "a removal could not be effected unless all the parties on the same side of the controversy united in the petition."). In 2011, Congress codified the unanimous consent requirement in 28 United States Code Section 1446, the section regarding "Procedure for removal actions." Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011) (codified as amended at 28 U.S.C. §§ 1332–1446 (2012)). In its present form, Section 1446 states that "[w]hen a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A) (2012); see also 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed ... to the district court of the United States for the district and division embracing the place where such action is pending."). Federal circuits are divided as to whether the rule of unanimity allows one defendant to file timely notice of removal which asserts the consent of all other codefendants. Compare *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1186–88 (8th Cir. 2015), and *Mayo v. Bd. of Educ.*, 713 F.3d 735, 742 (4th Cir. 2013), and *Proctor v. Vishay Intertech. Inc.*, 584 F.3d 1208, 1225 (9th Cir. 2009), and *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 200–02 (6th Cir. 2004), with *Roe v. O'Donohue*, 38 F.3d 298, 300–01 (7th Cir. 1994), and *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988). See generally Adam R. Prescott, Note, *On Removal Jurisdiction's Unanimous Consent Requirement*, 53 WM. & MARY L. REV. 235 (2011). The Fourth Circuit has held that co-defendants satisfy the rule of unanimity when an attorney for a single defendant files timely notice of removal representing that all defendants consent. See *Mayo*, 713 F.3d at 742. The codefendants in *Swart* clearly satisfied this standard. See *Swart*, 2015 WL 7430795, at *8 (noting that the defendant attorney for the accounting firm filed a notice of removal with separate notices of consent from all defendants attached). The case's novel controversy,

By mid-August of 2015, Swart, Pawar, and MRA were the sole parties to the original complaint and counterclaims remaining in the litigation.³⁸ On August 21, 2015, the plaintiff and defendants filed respective motions for summary judgment.³⁹

In considering the motions for summary judgment, the district court addressed issues pertinent to the arguments on appeal regarding Pawar's removal authority.⁴⁰ Most significantly, the court considered Pawar's authority to bring counterclaims against Swart on behalf of MRA.⁴¹ To do so, the court looked to several sections of the Pennsylvania Business Corporation Law of 1988.⁴² In relevant part, Section 1721 states that corporate powers enumerated in Section 1502 "shall be exercised by or under the authority of, and the business and affairs of every business corporation shall be managed under the direction of, a board of directors" unless otherwise provided by statute or a bylaw adopted by a corporation's shareholders.⁴³ Section 1721 notes that if a bylaw does alter this default rule, the powers involved "shall be exercised or performed to such extent and by such person or persons as shall be provided in the bylaws."⁴⁴ The enumerated powers in Section 1502 include the authority "to sue and be sued, complain and defend and participate as a party or otherwise in any judicial, administrative, arbitrative or other proceeding in its corporate name."⁴⁵

therefore, lies not in unanimous consent amongst the codefendants but rather in the authority of Pawar to unilaterally grant consent on behalf of MRA without board approval. *See, e.g.*, Corrected Brief of Appellant, *supra* note 29, at 14–19.

³⁸ *Swart*, 2015 WL 7430795, at *9. Pawar and MRA also filed a third-party complaint against Dr. Johnson and his wife. *Id.* at *8. The district court considered their claim and the Johnsons' subsequent counterclaim in the November and December 2015 Memoranda on Motions for Summary Judgment, but these claims were immaterial to the issue of removal. *See generally id.*

³⁹ *Id.* at *9.

⁴⁰ *See id.* at 12–16; Corrected Brief of Appellant, *supra* note 29, at 14–19. Naturally, the district court did not directly consider the issue of consent to removal at the summary judgment stage, as it had already addressed the issue when it denied Swart's motion to remand. *See, e.g.*, *Swart*, 2015 WL 7430795, at *9; Summary Order Following Scheduling Conference, *supra* note 28, at 2 ("DENIED the motion to remand (dkt. no. 12)...").

⁴¹ *See Swart*, 2015 WL 7430795, at *13–14.

⁴² Pennsylvania Business Corporation Law of 1988, 15 PA. CONS. STAT. §§ 1502, 1721 (1988); *see Swart*, 2015 WL 7430795, at *11.

⁴³ 15 PA. CONS. STAT. § 1721(a).

⁴⁴ *Id.*

⁴⁵ *Id.* § 1502(a).

Considering the bylaws themselves, the court accepted Pawar's argument that the section concerning presidential authority controlled the question of authority to bring suit.⁴⁶ That section provided that the president of the corporation possessed "general and active management of the business of the corporation" and the responsibility to see that all orders and resolutions of the board of directors take effect.⁴⁷

However, the court did not accept Pawar's contention that "general and active management" included the right to bring suit without board approval.⁴⁸ Here, Pawar had relied on a 1978 Pennsylvania Court of Common Pleas case, *Harcourt Wells, Inc. v. Cohen*.⁴⁹ *Harcourt* held that "the president of a corporation has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation."⁵⁰ The district court declined to follow Pawar's *Harcourt* argument, relying instead on a more recent Pennsylvania case, *McGuire Performance Sol., Inc. v. Massengill*.⁵¹ The district court held that *McGuire* precluded *Harcourt's* ruling that the "general and active management" power included a presumptive authority of corporate presidents to bring suit without board consent, particularly in the context of a lawsuit against a shareholder.⁵² Noting that "[e]ven if this Court were to accept the premise that [the bylaws] grant[] the president the power to bring suit," the judge determined that it was

⁴⁶ *Swart*, 2015 WL 7430795, at *13 (rejecting Swart's argument that a section addressing majority voting for corporate actions necessitating a vote of the shareholders was the controlling section). For simplicity's sake, this Note will refer to the arguments of defendant MRA solely as the arguments of Pawar, as he was asserting that he had presidential authority to bring suit and remove suit on behalf of MRA.

⁴⁷ *Id.* at *12.

⁴⁸ *Id.* at *12–13.

⁴⁹ *Id.* at *12; *Harcourt Wells, Inc. v. Cohen*, 6 Pa. D. & C.3d 183 (Pa. C.P. Phila. Cty. 1978).

⁵⁰ *Harcourt*, 6 Pa. D. & C.3d, at 187–88 (citing *Cicero Indus. Dev. Corp. v. Roberts*, 312 N.Y.S.2d 893 (Sup. Ct. 1970) and *West View Hills, Inc. v. Lizau Realty Corp.*, 160 N.E.2d 622 (N.Y. 1959)).

⁵¹ *Swart*, 2015 WL 7430795, at *12–13; *McGuire Performance Sol., Inc. v. Massengill*, 904 A.2d 971 (Pa. Super. Ct. 2006).

⁵² *Swart*, 2015 WL 7430795, at *12–13 (emphasizing that *McGuire* involved the power of corporate presidents to bring suits against third-party debtors rather than a general presumptive authority to bring suits against shareholders).

unlikely that the bylaws would presumptively, rather than explicitly, authorize Pawar to file a suit against a fifty percent co-equal shareholder because suits against shareholders are not “part and parcel of the business of the corporation.”⁵³ Instead, the court held, Pawar could only seek a remedy on behalf of MRA through a derivative action.⁵⁴ Since the doctor did not adequately plead the counterclaims as derivative actions, the court granted summary judgment for Swart on these counterclaims.⁵⁵

B. Arguments on Appeal: The Authorities to Bring Suit, Defend Suit, and Consent to Removal

Since the District Court for the Northern District of West Virginia dismissed a number of Swart and Pawar’s other claims in its November 19, 2015 Order and the remainder of the parties’ claims and counterclaims in the December 4 Order, the parties appealed and cross-appealed to the Fourth Circuit.⁵⁶ Both sides’ arguments on appeal alluded to an inconsistent reasoning between the district court’s ruling on the motion to remand and the motions for summary judgment.⁵⁷

⁵³ *Id.* at *13 (contrasting such suits with suits against third-party debtors, which a president could conceivably initiate under the “general and active management” power).

⁵⁴ *Id.* at *13. Under Federal Rule of Civil Procedure 23.1, a shareholder may bring a derivative suit to “enforce a right that the corporation or association may properly assert but has failed to enforce.” FED. R. CIV. P. 23.1(a). Since Pawar, on behalf of MRA, did not adequately plead the counterclaim by stating with particularity an effort to demand that the board of directors file a counterclaim against Swart, the court concluded that his counterclaim failed as a derivative action under federal and Pennsylvania law. *See Swart*, 2015 WL 7430795, at *13–15 (citing *Kamen v. Kemper Fin. Serv’s., Inc.*, 500 U.S. 90, 96 (1991); *Kanter v. Barella*, 489 F.3d 170, 176 (3rd Cir. 2007); *Warden v. McLelland*, 288 F.3d 105, 110 (3rd Cir. 2002); *Cuker v. Mikalauskas*, 692 A.2d 1042, 1049 (Pa. 1997); 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1831 (3d ed. 2015)).

⁵⁵ *See Swart*, 2015 WL 7430795, at *14.

⁵⁶ *See Swart v. Pawar*, 684 F. App’x 306, 307 (4th Cir. 2017); *Swart v. Pawar*, No. 1:14-CV-10, 2015 WL 8056115, at *1 (N.D.W.V. Dec. 4, 2015), *aff’d per curiam*, 684 F. App’x 306 (4th Cir. 2017), *cert. denied*, No. 17-167, 2017 WL 3324960 (2017); *Swart*, 2015 WL 7430795, at *18–19. With regard to the parties’ arguments on appeal, this Note will refer to Swart as the “appellant” and Pawar as the “appellee.”

⁵⁷ *See infra* notes 58–71 and accompanying text.

Appellant Swart's primary assignment of error directly addressed the relation between the motion to remand and the subsequent summary judgment ruling.⁵⁸ The doctor contended that the appellees had made the same arguments for Pawar's presidential authority to consent to removal as they made for his ability to bring suit at the summary judgment stage.⁵⁹ A close examination of the defendants' Memorandum of Law in Opposition to the Motion to Remand reveals this to be true.⁶⁰ In the memorandum, the defendants argued that pursuant to Section 1721(a), MRA "availed itself of the opportunity to confer the power to manage MRA upon the President," as the bylaws gave Pawar "general and active management" of the corporation.⁶¹ Furthermore, the defendants had also cited *Harcourt* to assert that such removal authority included the power to "manage the defense of MRA in this litigation."⁶²

Swart accordingly attacked the appellees' arguments against remand by parroting the conclusions of the district court in its consideration of the motions for summary judgment.⁶³ Addressing Pawar's chief precedential case, the appellant noted that the district court wrote: "in the nearly forty years since *Harcourt* was decided, courts have been reluctant to afford corporate presidents broad authority to sue in the corporate name, particularly in instances where the suit would be against a co-equal 50% shareholder."⁶⁴ Swart also pointed to the district court's reliance on *McGuire*, quoting the court's conclusion that "since 2006, it appears that Pennsylvania courts have rejected outright such a broad presumption of power [to bring suit against a co-equal shareholder under the 'general and active management' clause]."⁶⁵ The appellant similarly drew attention to another case which the district court cited, *Amramsky v. Zmirli*, because that Pennsylvania court

⁵⁸ See Corrected Brief for Appellant, *supra* note 29, at 1.

⁵⁹ See *id.* at 14–19.

⁶⁰ See Memorandum of Law in Opposition to Plaintiff's Motion to Remand at 4–6, Swart v. Pawar, 1:14-CV-10, 2015 WL 8056115 (N.D.W.V. Feb. 28, 2015), ECF No. 17.

⁶¹ *Id.* at 5.

⁶² *Id.* at 5–6 (citing *Harcourt Wells, Inc. v. Cohen*, 6 Pa. D. & C.3d 183, 188, 190 (Pa. C.P. Phila. Cty. 1978)).

⁶³ See Corrected Brief of Appellant, *supra* note 29, at 17–19.

⁶⁴ *Id.* at 17 (quoting Swart v. Pawar, No. 17-167, 2015 WL 7430795, at *1 (N.D.W.V. Nov. 19, 2015)).

⁶⁵ *Id.*

determined that such broad authority “does not appear to be a generally accepted legal principle in Pennsylvania.”⁶⁶ Swart naturally agreed with the district court’s rejection of the defendants’ argument that Pawar’s presidential authority allowed him to bring suit on behalf of MRA without board consent against a co-equal shareholder co-director.⁶⁷ However, the appellant argued that if this was indeed the correct ruling, and the defendants applied the same contentions and outdated law on the issue of removal, then Pawar’s arguments in favor of removal must also fail because unilateral consent to removal of a case against a co-equal shareholder is akin to a president’s unilateral filing of such a claim.⁶⁸

Pawar’s removal argument on appeal necessarily addressed the district court’s holding that he could not bring direct suit, but the radiologist also sought to distinguish the ruling from the issue of removal.⁶⁹ Pawar argued that if a prohibition on presidential authority to unilaterally bring suit likewise applies to the authority to unilaterally consent to removal as Swart suggested, the president would not have the authority to defend the suit on behalf of the corporation.⁷⁰ Such a conclusion, Pawar asserted, would be “preposterous” because the power to defend is naturally within the “general and active management” of a corporation, and without this authority, a corporation could risk default judgment when a co-equal shareholder sues a corporation.⁷¹

Unfortunately, the Fourth Circuit provided no guidance on the issue of removal and its relationship to the power to bring and defend suit.⁷² After summarizing the parties’ appealed claims and

⁶⁶ *Amramsky v. Zmirli*, No. 12-6382, 2013 WL 373274, at n.2 (E.D. Pa. Jan. 31, 2013); *see* Corrected Brief of Appellant, *supra* note 29, at 18 (citing *Swart*, 2015 WL 7430795, at *1).

⁶⁷ *See* Corrected Brief of Appellant, *supra* note 29, at 16–17, 19.

⁶⁸ *See* Corrected Brief of Appellant, *supra* note 29, at 18–19; Response Brief of Appellant at 3–5, *Swart*, 684 F. App’x at 306 (No. 15-2519) (arguing that such a lawsuit is an “extraordinary business affair[]” outside any presidential power of “general and active management”).

⁶⁹ *See* Opening Response Brief of Appellees at 9–10, *Swart*, 684 F. App’x 306 (4th Cir. 2017) (No. 15-2519).

⁷⁰ *See id.* at 9–10 (operating under the assumption that Swart would not consent to removal as a director).

⁷¹ *See id.*

⁷² *See Swart*, 684 F. App’x at 307 (adopting the district court’s findings without explanation).

counterclaims, the court merely wrote: “[a]fter careful consideration of the relevant legal authority and the parties’ extensive briefs and oral arguments, we can find no error in the district court’s lengthy, detailed, and careful opinions. Accordingly, we affirm on the basis of the district court’s excellent opinions.”⁷³ Because the United States Supreme Court declined to grant a writ of certiorari, the case concluded without any judicial opinions extensively exploring the nature of the relationship between presidential authorities to bring suit, defend suit, and remove suits against co-equal shareholding co-directors.⁷⁴

Both Swart and Pawar presented cogent points. On its face, the district court’s rejection of presidential authority to bring direct suit against a co-equal shareholder and co-director without board approval appears to contradict the order upholding removal because Pawar’s arguments for consent to removal and authority to bring suit are grounded in the same case law.⁷⁵ However, more consistent reasoning denying presidential authority to unilaterally consent to removal could, as Pawar contended, lead courts to enter default judgments in similar suits due to a lack of presidential authority to *defend* suits against co-equal shareholders without board approval.⁷⁶ As neither the district court nor the Fourth Circuit provided any thoughts on the legitimacy of these removal arguments or offered methods in which they could be reconciled,⁷⁷ further analysis is necessary.

II. THE ANALOGY OF REMOVAL TO SUIT INITIATION AND DEFENSE

Swart’s contention rested on the premise that corporate removal authority is akin to the authority to initiate suit on behalf of a corporation with regard to “general and active management”

⁷³ *Id.*

⁷⁴ See Swart v. Pawar, 138 S. Ct. 322 (2017) (denying petition for writ of certiorari).

⁷⁵ See Corrected Brief of Appellant, *supra* note 29, at 1, 14–19 (naming this matter as the first issue in the “Statement of the Issues” on appeal); see also *supra* notes 56–68 and accompanying text.

⁷⁶ See Opening Response Brief of Appellees, *supra* note 69, at 9–10.

⁷⁷ See Summary Order Following Scheduling Conference at 2, Swart v. Pawar, No. 1:14-CV-10, 2015 WL 8056115 (N.D.W.V. Apr. 22, 2014) ECF No. 30 (denying the motion to remand); see also *supra* notes 60–74 and accompanying text.

powers.⁷⁸ This analogy is an initially attractive method of examining the authority to remove because there is considerable case law on corporate presidential authority to initiate (and defend) suit in cases involving co-equal shareholder litigants whereas the authority to consent to federal removal is a novel question of law.⁷⁹

The relationship between initiating, defending, and removing suit deserves scrutiny because both Swart and Pawar relied on the analogy when arguing consent to removal on appeal.⁸⁰ Swart's reliance on this analogy was straightforward: if there is a close relationship between a president bringing and removing suit, and the district court correctly applied Pennsylvania law at the summary judgment stage, then the district court erred in allowing Pawar to consent to removal.⁸¹ Pawar's counter-argument essentially raised two points of analogy. First, a president should have the power to remove, derived from a power to bring and defend suit under Pennsylvania law and "general and active management" authority.⁸² Although Pawar did not explicitly regard it as a separate argument, he made a second, distinct claim analogizing removal to defense out of necessity in a corporate emergency.⁸³ Accordingly, the suit initiation-defense-removal analogy must "fit" for either party's argument to provide an entirely satisfactory answer to the question of removal authority.

A. *The Analogy in Diversity*

Because *Swart* concerned removal for diversity jurisdiction, a comparison between the powers to initiate, defend, and remove in diversity is a good starting point when considering the aptitude of the analogy.⁸⁴ The general powers to defend suit and remove suit

⁷⁸ See, e.g., Corrected Brief of Appellant, *supra* note 29, at 16–19.

⁷⁹ See generally 2A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 618.10 (Carol A. Jones, ed.) (rev. vol. 2017).

⁸⁰ See *infra* notes 81–83 and accompanying text.

⁸¹ See, e.g., Corrected Brief of Appellant, *supra* note 29, at 16–19; Opening Response Brief of Appellees, *supra* note 69, at 7–10.

⁸² See Opening Response Brief of Appellees, *supra* note 69, at 7–10.

⁸³ See *id.* at 10 (insinuating that Swart's argument on removal logically leads to the conclusion that a corporate president cannot defend suit and must passively allow for default judgment against his corporation).

⁸⁴ See Notice of Removal at 1, *Swart v. Pawar*, No. 1:14-CV-10, 2015 WL 8056115 (N.D.W.V. Jan. 15, 2014) ECF No. 1 (petitioning to remove "based upon diversity jurisdiction conferred pursuant to 28 U.S.C. § 1332(a) (2012)").

share a tight bond, ostensibly closer than that of removing suit and initiating suit.⁸⁵ Only a defendant may remove to federal court,⁸⁶ and a defendant has a *right* to remove “any” civil state court cases which would be subject to original jurisdiction in federal courts.⁸⁷ However, the right to initiate suit in diversity is also closely connected to the rights to defend and remove.⁸⁸ For one, a plaintiff must be able to bring suit in diversity for a defendant to defend and remove suit in diversity.⁸⁹ The primary justification for the removal right in diversity—the idea that federal courts are less likely to be prejudiced against defendants who are not residents of the plaintiff’s chosen forum than local courts—also mirrors a main justification of original jurisdiction in diversity.⁹⁰ The powers to bring and defend suit in diversity therefore share a relatively close bond with the right to remove in diversity suits.⁹¹

However, the rights to bring and defend litigation in diversity are far from identical to that of removal.⁹² Although the

⁸⁵ See, e.g., 28 U.S.C. § 1441(a) (2012) (granting defendants, rather than plaintiffs, the power to remove). See generally 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 (4th ed. 2017) (explaining that justification for removal is based on policy to protect defendants from local bias).

⁸⁶ See 28 U.S.C. § 1441(a).

⁸⁷ See, e.g., *id.*; *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) (“The claim ... fixes the *right* of the defendant to remove, and the plaintiff ought not to be able to defeat that *right* and bring the cause back to the state court at his election.”) (emphasis added); *Lott v. Pfizer*, 492 F.3d 789, 793 (7th Cir. 2007) (“[T]he removal statute encourages litigants to make liberal use of federal courts, so long as the right to remove is not abused.”); *In re Briscoe*, 448 F.3d 201, 215 (3d Cir. 2006) (“By statute, a defendant has the right to remove a civil action from state court if the case could have been brought originally in federal court.”) (citing 28 U.S.C. § 1441(a)); *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 459 (5th Cir. 1982) (“28 U.S.C. § 1441 creates a broad right of removal which can be limited only by an act of Congress expressly prohibiting it.”).

⁸⁸ See, e.g., *infra* notes 89–91 and accompanying text.

⁸⁹ See 28 U.S.C. § 1332 (2012) (providing for diversity jurisdiction); § 1441(a) (“Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants”).

⁹⁰ See, e.g., 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE—CIVIL § 107.3 (3d ed. 2018); James Wm. Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 15–16 (1964) (writing that state court prejudice, or a fear thereof, was a primary reason for original support for statutory diversity jurisdiction).

⁹¹ See 16 MOORE ET AL., *supra* note 90, § 107.04.

⁹² See *id.*

power to remove in diversity is predicated on the ability of a plaintiff to initially bring the claim in diversity, original diversity jurisdiction is ultimately derived from the United States Constitution.⁹³ The right to remove is entirely statutory.⁹⁴ The federal courts and Congress have further distinguished the right to initiate and defend in diversity from the right to remove.⁹⁵ The United States Supreme Court held in *Shamrock Oil & Gas Corp. v. Sheets* that a plaintiff “defending” against counterclaims is prohibited from removing the suit to federal court.⁹⁶ Since *Shamrock Oil*, federal courts have tended to restrict removal to parties they deem to be “true defendants,” barring removal by litigants such as intervening plaintiffs defending against cross-claims, cross-claim defendants where the cross-claim alone is removable, and additional counterclaim defendants.⁹⁷ Moreover, courts have the ability

⁹³ See U.S. CONST. art. III, § 2 (“The judicial Power shall extend ... to all Controversies ... between Citizens of Different States”); 28 U.S.C. §§ 1332, 1441 (2012); 16 MOORE ET AL., *supra* note 90, § 107.04.

⁹⁴ See, e.g., 28 U.S.C. § 1441; 16 MOORE ET AL., *supra* note 90, § 107.04.

⁹⁵ See *infra* notes 96–99 and accompanying text.

⁹⁶ See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106–07 (1941) (holding that a plaintiff who selected the state court forum could not subsequently remove to federal court after a defendant subsequently filed a counterclaim).

⁹⁷ See, e.g., *In re Crystal Power Co.*, 641 F.3d 78, 79 (5th Cir. 2011), *withdrawn on other grounds*, 641 F.3d 82 (5th Cir. 2011) (“The case was removed ... by an intervening plaintiff who became named as the defendant on several cross-claims. Because the removal statute may only be invoked by a *true defendant*, not a cross-defendant, we ... instruct the district court to remand the case to state court.”) (emphasis added); *Palisades Collections, LLC v. Shorts*, 552 F.3d 327, 333 (4th Cir. 2008) (“[A]dditional counter-defendants, like third-party defendants, are certainly not defendants against whom the original plaintiff asserts claims. Thus, we easily conclude that an additional counter-defendant is not a ‘defendant’ for purposes of § 1441(a).”); *Lawyers Title Ins. v. Pioneer Nat’l Title Ins.*, 600 F. Supp. 402, 404 (D.S.C. 1984) (“The court is of the opinion that removal is improper under § 1441(c) when the only removable claim is asserted by cross-claimants.”). Since federal courts determine which parties are “true defendants,” parties who defend against certain claims and are considered defendants in state court may accordingly lack the ability to remove because they are not defendants under the federal removal statute. See, e.g., *Chi., Rock Island & Pac. R.R. Co. v. Stude*, 346 U.S. 574, 579–80 (1954). For a summary of the types of cases where a party “defending” a claim has been denied removal and the methods federal courts use to determine “true defendants,” see generally 16 MOORE ET AL., *supra* note 90, § 107.41. In the context of this discussion, it is merely important to recognize that a party may “defend” against certain types of claims yet lack the power to remove where diversity jurisdiction otherwise exists.

to remand for procedurally defective removal in cases where original diversity jurisdiction would otherwise exist.⁹⁸ Legislative provisions further limiting these rights include the prohibition against diversity removal if the defendant is a resident of the state where the plaintiff commenced the action and the one-year statutory time limit by which a defendant must remove.⁹⁹

Put simply, there are many peculiar circumstances in potential diversity suits where a party can defend against a claim but cannot successfully remove that claim.¹⁰⁰ These instances where the right to remove diverges from the right to initiate or defend suit do not entirely delegitimize the analogy,¹⁰¹ but they highlight the idea that the actions have a somewhat tenuous relationship that may present difficulties when using the analogy to examine initiation-defense case law to address the issue of removal authority.¹⁰²

B. The Analogy in the Context of Swart's Corporate Dispute

With the understanding that the relationship between the powers to initiate, defend, and remove suits in diversity has limits,¹⁰³ a comparison between court treatment of the authority of a corporate president to initiate suit and the authority to defend suit is also necessary to evaluate the *Swart* analogies.¹⁰⁴ Such

⁹⁸ See 16 MOORE ET AL., *supra* note 90, §§ 107.41, 107.151. Perhaps unsurprisingly, federal courts differ on what defects are sufficient to remand for “defect in removal procedure.” See *id.* Lack of unanimity is generally considered a procedural defect, but it is not always fatal. See, e.g., *Chambers v. HSBC Bank USA, N. Am.*, 796 F.3d 560, 565 (6th Cir. 2015); *Albert v. Bayerische Motorenwerke Aktiengesellschaft*, 45 F. App’x 170, 171 (3d Cir. 2002); *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 653 (7th Cir. 1998); *Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998).

⁹⁹ See 28 U.S.C. §§ 1441(b), 1446(c)(1) (2012); 16 MOORE ET AL., *supra* note 90, § 107.04.

¹⁰⁰ See *supra* notes 92–99 and accompanying text.

¹⁰¹ See *supra* notes 85–99 and accompanying text.

¹⁰² For a more in-depth consideration of this idea, see Part III.

¹⁰³ See *supra* Section II.A.

¹⁰⁴ See *infra* notes 105–06 and accompanying text. Since Section II.A demonstrated that the authority to defend in diversity is predicated on a plaintiff’s ability to bring suit in diversity, Section II.B’s mode of analysis would be redundant in the diversity context. See, e.g., *supra* note 89. The analysis of this portion of Part II instead demonstrates that courts do not distinguish between the authority to bring suit and the authority to defend suit in the stated context.

analysis is critical because the cases considering presidential litigative authority typically involve presidents who initiate *or* defend suit without board approval.¹⁰⁵ A marked distinction between the authority to defend and the authority to initiate suit would further wrinkle Part III's evaluation of the analogy of these authorities to removal authority.¹⁰⁶

This inquiry, however, reveals that courts considering presidential litigative authority do not distinguish between the authority to initiate and the authority to defend such suits.¹⁰⁷ Most courts have simply ruled on suit initiation *or* defense without mentioning the other action or drawing a distinction between the two, an understandably narrow consideration given that a president's authority to initiate *and* defend litigation is not always at issue in a singular case.¹⁰⁸ Others have ruled on the authority at issue—suit initiation or defense—but have discussed both authorities as if

¹⁰⁵ Compare, e.g., *Custer Channel Wing Corp. v. Frazer*, 181 F. Supp. 197 (S.D.N.Y. 1959) (concerning the president's authority to initiate suit), with *Kelly v. Citizens Fin. Co. of Lowell*, 28 N.E.2d 1005 (Mass. 1940) (concerning the president's authority to defend suit without board approval).

¹⁰⁶ See *infra* Part III for this evaluation. For instance, a court could conceivably hold that the authority to initiate suit differs from the authority to defend suit in a certain context.

¹⁰⁷ See *infra* notes 108–10 and accompanying text. Many of the citations immediately following this footnote involve presidential authority to initiate and defend suits against co-equal shareholders. See, e.g., *1-800 Postcards, Inc. v. Morel*, 153 F. Supp. 2d 359, 365 (S.D.N.Y. 2001); *Glisson Coker, Inc. v. Coker*, 581 S.E.2d 303, 305–06 (Ga. Ct. App. 2003). The reasoning of such decisions relevant to *Swart's* removal will be analyzed in Part III. See *infra* Part III. In the present portion of the analysis, they merely serve to show that courts do not tend to rule that a president may defend such suits but not initiate them, demonstrating that the corporate context itself does not delegitimize an analogy between the abilities to initiate suit, defend suit, and remove suit.

¹⁰⁸ See, e.g., *Regal Cleaners & Dyers v. Merlis*, 274 F. 915, 917 (2d Cir. 1921) (holding that a corporate president may have authority to answer a bankruptcy petition without board approval); *1-800 Postcards*, 153 F. Supp. 2d at 365 (finding that the president had implied authority to institute a lawsuit where a fifty percent co-equal shareholder and director engaged in tortious conduct to the detriment of the corporation); *Glisson Coker*, 581 S.E.2d at 305–06 (finding no authority for president to file suit against co-equal defendant shareholder with equal amount of control of the close corporation); *Kelly*, 28 N.E.2d at 1006 (holding that the president did not have authority to hire an attorney to defend suit); *Tidy-House Paper Corp. v. Adlman*, 168 N.Y.S.2d 448, 451 (App. Div. 1957) (“There can be no implied authority on the part of an officer of a corporation to sue one in equal control.”).

they are indistinguishable.¹⁰⁹ Notably, the three main Pennsylvania cases on presidential authority cited in *Swart—Harcourt Wells, McGuire*, and *Amramsky*—do not draw any distinction between presidential authority to bring and defend suit without board approval.¹¹⁰

A few courts have explicitly addressed the authority of corporate presidents to prosecute *and* defend suits without board approval.¹¹¹ In one notable case, *West View Hills, Inc. v. Lizau Realty Corp.*, a New York court ruled on the ability to bring suit but broadly held that “the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation.”¹¹² The Supreme Court of New Jersey has gone so far as to state that presidential authority to defend suit without board approval logically leads to the conclusion that presidents have the authority to initiate suit as well.¹¹³

¹⁰⁹ See, e.g., *Ono v. Itoyama*, 884 F. Supp. 892, 896–99 (D.N.J. 1995) (discussing precedent on corporate presidential authority to defend suit and ruling on a case concerning suit initiation); *Anmaco, Inc. v. Bohlken*, 16 Cal. Rptr. 2d 675, 679, 679 n.2 (Ct. App. 1993) (ruling on the authority to initiate but noting that “[w]e express no view on the president’s power to institute or defend litigation in an emergency or involving an outsider or where the bylaws may grant the power to do so.”); *Conlee Constr. Co. v. Cay Constr. Co.*, 221 So. 2d 792, 795–96 (Fla. Dist. Ct. App. 1969) (holding that a president had an affirmative duty to sue a director and co-equal shareholder but noting that there is precedent supporting the authority to bring suit and defend suit); *Chun v. Bd. of Trs.*, 952 P.2d 1215, 1228 (Haw. 1998) (ruling on an administrator’s authority to appeal but noting that corporate presidents have been allowed to bring and defend suit to “preserve vital corporate interests [where] urgent.”) (quoting *Conlee*, 221 So. 2d at 795–96)).

¹¹⁰ See *Amramsky v. Zmirli*, No. 12-6382, 2013 WL 373274, at *2, n.2 (E.D. Pa. Jan. 31, 2013) (addressing the defendants’ contentions that a president has the authority to bring or defend suit on behalf of the corporation based on *Harcourt’s* precedent); *McGuire Performance Sol., Inc. v. Massengill*, 904 A.2d 971, 976–77 (Pa. Super. Ct. 2006) (ruling on authority to institute suit and refraining from addressing or distinguishing the authority to defend suit); *Harcourt Wells, Inc. v. Cohen*, 6 Pa. D. & C.3d 183, 187–88 (Pa. C.P. Phila. Cty. 1978) (addressing the authority to bring suit but discussing New York cases addressing the authority to bring or defend suit).

¹¹¹ See *infra* notes 112–13.

¹¹² *West View Hills, Inc. v. Lizau Realty Corp.*, 160 N.E.2d 622, 623 (N.Y. 1959) (quoting *Rothman & Schneider, Inc. v. Beckerman*, 141 N.E.2d 610, 613 (1957)).

¹¹³ See *Elblum Holding Corp. v. Mintz*, 1 A.2d 204, 207 (N.J. 1938) (“If ... a president of a corporation may take the necessary steps in defense of litigation prosecuted against his corporation ... so, in reason and justice, he may employ and authorize counsel to institute necessary legal proceedings for the like purpose”).

But although many courts do not make such broad holdings on corporate presidential authority to both bring and defend suit,¹¹⁴ they also do not distinguish between the authorities to initiate and defend when discussing different sources of litigative authority.¹¹⁵ This lack of distinction is relevant to *Swart's* question of removal by a corporate president with "general and active management" or "emergency" powers.¹¹⁶ On appeal, Swart argued that the district court's holding that Pawar lacked authority to bring suit under "general and active management" powers and Pennsylvania law should extend to Pawar's authority to consent to removal on behalf of MRA.¹¹⁷ Pawar countered, arguing that the right to defend incorporated the right to remove and that the right to defend is an essential action of business management.¹¹⁸ But Pawar also made what amounts to an "emergency" authority argument, asserting that a lack of authority to defend, and thus remove, would be illogical because courts would enter default judgment against corporate defendants in cases where the board does not authorize defense.¹¹⁹ The difference between Pawar's "emergency" and "general and active management" arguments is palpable, yet courts discussing these sources of presidential litigative authority do not distinguish between initiation and defense.¹²⁰

Taken as a whole, this Part's evaluations indicate that the initiation-defense-removal analogy is an imperfect yet potentially workable method of exploring a corporate president's authority to remove suit to federal court.¹²¹ The rationale of removal in diversity mirrors that of the power to file and thus defend diversity claims,¹²²

¹¹⁴ *Contra supra* notes 111–13 and accompanying text.

¹¹⁵ *See supra* notes 107–13 and accompanying text.

¹¹⁶ *See, e.g.*, Opening Response Brief of Appellees, *supra* note 69, at 9–10.

¹¹⁷ *See id.*

¹¹⁸ *See id.* at 7–10.

¹¹⁹ *See id.* at 10; *see also infra* Section III.A.

¹²⁰ *Compare, e.g.*, *Anmaco, Inc. v. Bohlken*, 16 Cal. Rptr. 2d 675, 678 (Ct. App. 1993) (evaluating the authority to initiate suit against a co-equal shareholder with regard to a bylaw granting the president "general supervision, direction and control of the business and officers of the corporation"), *with West View Hills, Inc. v. Lizau Realty Corp.*, 160 N.E. 2d 622, 623–24 (N.Y. 1959) (holding that the president had authority to initiate suit without board authorization or any bylaw provision because it was necessary to protect the interests of the corporation).

¹²¹ *See supra* Sections II.A–B.

¹²² *See supra* note 90 and accompanying text.

but there are notable exceptions to the function of original diversity jurisdiction and removal jurisdiction.¹²³ Courts also do not distinguish between initiation and defense in cases involving presidential authority to sue and defend suit on behalf of the corporation without board consent.¹²⁴ The analogy, though imperfect, could therefore conceivably present resolutions to *Swart*'s question of removal authority.

III. FILLING IN THE GAPS: APPLYING ... AND RETHINKING THE INITIATION-DEFENSE-REMOVAL ANALOGY

When considering the initiation-defense-removal analogy, possible resolutions to the removal issue in *Swart* arise when surveying decisions concerning the litigative powers of corporate presidents who lack board approval to bring or defend suit.¹²⁵ Any conclusions will be limited in scope for several reasons. As noted, the initiation-defense-removal comparison is imperfect.¹²⁶ The law of corporations is also largely the province of the individual states,¹²⁷ and varying jurisdictions apply different corporate laws to corporate entities with articles of incorporation and bylaws that do not precisely mirror those of MRA.¹²⁸ With these limitations in mind, case law on presidential litigative authority suggests three major outcomes for the question of removal in *Swart*: Pawar possessed emergency authority to remove to federal, Pawar lacked requisite authority to act against a co-equal shareholder and director, and a divergence from the initiation-defense-removal analogy altogether in favor of a more pragmatic approach to the issue.¹²⁹

¹²³ See *supra* notes 92–100 and accompanying text.

¹²⁴ See *supra* notes 107–14 and accompanying text.

¹²⁵ See *infra* Sections III.A–C.

¹²⁶ See *supra* Section II.A.

¹²⁷ See, e.g., 2A FLETCHER ET AL., *supra* note 79, § 2.50 (“Modern corporations are creatures of statute, deriving their existence and authority to act from the state. Today, the statutes of every state contain a corporations or general business act or code.”) (footnote excluded).

¹²⁸ See *id.* § 146 (noting that most states permit corporations to include some provisions for the “management of business and the regulation of affairs of ... corporation[s]” within their articles of incorporation); § 4166 (explaining general ways in which courts apply state corporate law to corporations’ bylaws, the primary documents regulating the management and internal affairs of corporations).

¹²⁹ See *infra* Sections III.A–C.

A. A Problematic Proposition: Pawar Possessed Authority to Remove Suit in an Emergency Situation Against Swart as President of MRA

Of Pawar's two arguments,¹³⁰ courts siding with corporate presidents in disputes similar to that of *Swart* have tended to favor his "emergency" argument.¹³¹ Pawar's claim that "[t]aken to its logical evolution, absent the permission and consent of Swart, Pawar as President would not have the authority to defend the action brought by Swart thus resulting in a default judgment,"¹³² amounts to an agency argument that the president possesses authority to initiate, defend, and remove suit to protect the corporation and its property during an emergency.¹³³

Multiple courts have recognized similar authority.¹³⁴ In the 1938 case *Elblum Holding Corp. v. Mintz*, the Supreme Court of New Jersey held that a president could both defend and initiate suit on behalf of his corporation to "preserve the corporate assets" where his family owned half of the company's stock and the defendant

¹³⁰ See Opening Response Brief of Appellees, *supra* note 69, at 7–10.

¹³¹ See, e.g., *1-800 Postcards, Inc. v. Morel*, 153 F. Supp. 2d 359 (S.D.N.Y. 2001); *Conlee Constr. Co. v. Cay Constr. Co.*, 221 So. 2d 792, 796–97 (Fla. Dist. Ct. App. 1969); *Lydia E. Pinkham Med. Co. v. Gove*, 9 N.E.2d 575, 579–80 (Mass. 1937); *First Cmty. St. Bank of Savannah v. Pemberton*, 493 S.W.2d 692, 696 (Mo. Ct. App. 1973); *Elblum Holding Corp. v. Mintz*, 1 A.2d 204, 204–07 (N.J. 1938); *West View Hills v. Lizau Realty Corp.*, 160 N.E.2d 622, 624 (N.Y. 1959); *Rothman & Schneider, Inc. v. Beckerman*, 141 N.E.2d 610, 613 (N.Y. 1957); 2A FLETCHER ET AL., *supra* note 79, § 618.10; Roger J. Goebel, *The Authority of the President Corporate Litigation: A Study in Inherent Authority*, 37 ST. JOHN'S L. REV. 29 (1962); *infra* Section III.B.

¹³² Opening Response Brief of Appellees, *supra* note 69, at 10.

¹³³ See, e.g., *First Cmty. St. Bank*, 493 S.W.2d at 696 (concluding that the case's circumstances "combined to create an emergency situation in which Hayden justifiably felt that he had to take prompt action in his capacity as president without any further effort to call upon the demoralized Board"); see also *1-800 Postcards, Inc.*, 153 F. Supp. 2d at 365 (describing emergency agency authority as "implied" authority). For an analysis of why this authority is primarily inherent authority, see generally Goebel, *supra* note 131. Section III.B will address Pawar's other claim of authority to remove, an argument more clearly asserting "implied" authority. See *infra* Section III.B. For the purposes of this section analyzing case law on initiation-defense-removal, it does not matter whether the emergency authority is actually "implied" or "inherent."

¹³⁴ See generally 2A FLETCHER ET AL., *supra* note 79, § 618.10.

shareholder's family owned the other half of the shares.¹³⁵ Expounding on this emergency principle in 1958, the New York Court of Appeals held that a president must be able to institute or defend suit to "protect and preserve the interest of the plaintiff corporation" unless "a provision in the by-laws of action by the board of directors prohibit[s] the president from defending and instituting suit in the name of and in behalf of the corporation."¹³⁶ A Florida Court has gone so far as to overrule a bylaw that would have otherwise blocked a president's direct suit against a defendant stockholder who, along with his wife, controlled half of the board.¹³⁷ More recently, the Southern District of New York, applying New York law in a case involving deadlocked 50% co-equal shareholder directors, found that a president had implied authority to institute suit against his fellow co-equal shareholder for tortious conduct harming the corporation.¹³⁸

But while some courts have recognized this emergency authority to bring and defend suit against co-equal shareholder directors without board consent,¹³⁹ this potential resolution to *Swart's*

¹³⁵ See *Elblum Holding Corp.*, 1 A.2d at 204–07; see also *Lydia E. Pinkham Med. Co.*, 9 N.E.2d at 579–80 (finding a presidential "duty to act" under similarly adverse co-equal familial ownership without explicitly discussing necessity or emergency).

¹³⁶ *West View Hills, Inc.*, 160 N.E.2d at 624 (applying the principle to a case with deadlocked co-directors who were not co-equal shareholders); see, e.g., *Rothman & Schneider, Inc.*, 141 N.E.2d at 613 ("Where there has been no direct prohibition by the board, then, it has been held, the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation."); see also Goebel, *supra* note 131, at 69, 79–80, 80, n.180 (concluding that this emergency power in *West View Hills* is actually inherent rather than implied authority because it derives from the agency relationship rather than any factual implication by the principal corporation to the agent president).

¹³⁷ See *Conlee Constr. Co. v. Cay Constr. Co.*, 221 So. 2d 792, 796–97 (Fla. Dist. Ct. App. 1969) (emphasizing that prohibiting plaintiff president's suit would amount to immunity for defendant).

¹³⁸ See *1-800 Postcards*, 153 F. Supp. 2d at 365 (determining that even where the litigants are co-equal shareholders, "[t]he president of a corporation faced with a deadlocked board has implied authority in emergency situations to take actions necessary to protect the corporation that otherwise would require board action.").

¹³⁹ See *id.*; *Conlee Const. Co.*, 221 So. 2d at 792; *Lydia E. Pinkham Med. Co.*, 9 N.E.2d at 575; *Elblum Holding Corp.*, 1 A.2d at 204; *West View Hills, Inc.*,

question of removal has significant complications. First, courts have inconsistently applied emergency authority with regard to litigation in co-equal shareholder cases.¹⁴⁰ For instance, in *Sterling Industries v. Ball Bearing Corporation*, the New York Court of Appeals determined that no emergency existed where the plaintiff's affidavits merely asserted that the suit was "critical and vital to the interests of the corporation," and lacked any factual showing of an "urgency" to presently preserve the day to day business of the corporation.¹⁴¹ Ten years later, in *West View Hills*, the same court created a "presumptive" presidential authority to initiate or defend suit on behalf of the corporation in emergency circumstances without any substantive factual showing.¹⁴² Courts have subsequently read these two cases together without holding that *West View Hills* supersedes *Sterling Industries*.¹⁴³ Since courts have not explicitly considered the issue of emergency authority for *removal*, it is unclear whether courts recognizing emergency removal authority should endorse a broader or narrower application of such power.¹⁴⁴

Second, and more pertinently, it is possible that "emergency" circumstances may never justify recognition of presidential removal authority.¹⁴⁵ Courts have been reluctant to say that corporate presidents have no authority to initiate and defend suit where they would otherwise be barred from obtaining a legal remedy or mounting any legal defense, but an emergency situation that requires defense of a corporation's assets does not clearly necessitate

160 N.E.2d at 622; *Rothman & Schneider, Inc.*, 41 N.E.2d at 610; 2A FLETCHER ET AL., *supra* note 79, § 618.10; *supra* notes 135–38 and accompanying text.

¹⁴⁰ Compare, e.g., *Elblum Holding Corp.*, 1 A.2d at 204–07, and *West View Hills, Inc.*, 160 N.E.2d at 624, with *Sterling Indus. v. Ball Bearing Pen Corp.*, 84 N.E.2d 790, 794 (N.Y. 1949).

¹⁴¹ See *Sterling*, 84 N.E.2d at 794; see also *Chun v. Bd. of Trs.*, 952 P.2d 1215, 1228 (Haw. 1998) (citing *Sterling's* focus on evidentiary findings and urgency).

¹⁴² See *West View Hills, Inc.*, 160 N.E.2d at 622–24 (assuming the veracity of the emergent allegations outlined in the complaint).

¹⁴³ See, e.g., *Ono v. Itoyama*, 884 F. Supp. 892, 898 (D.N.J. 1995) (discussing the opinions' rationales with regard to emergency authority under the facts of each case); *Stone v. Frederick*, 666 N.Y.S.2d 294, 295–96 (App. Div. 1997).

¹⁴⁴ Compare *West View Hills, Inc.*, 160 N.E.2d at 623–24 (expounding the broad conception of emergency authority), with *Sterling*, 84 N.E.2d at 794 (discussing narrower conditions for emergency authority to initiate and defend suit).

¹⁴⁵ See *infra* notes 146–50 and accompanying text.

a recognition of removal authority where remedies are available in state court.¹⁴⁶ Emergency circumstances could conceivably allow a president to defend suit from a co-equal shareholder in state court without enabling removal to federal court.¹⁴⁷

This would not be an unreasonable conclusion for two reasons. For one, the overwhelming body of state court cases on co-equal shareholder initiation and defense indicates that a state court proceeding does not inherently prejudice a corporation where a remedy is available.¹⁴⁸ Additionally, there are many circumstances where otherwise “diverse” parties’ abilities to bring and defend a suit diverge from the ability to successfully remove to federal court.¹⁴⁹ The case law on emergency authority does not yield the conclusion that such power must necessarily extend to removal, rendering the analogy a less than satisfactory method of resolving the removal question in light of emergency powers arguments.¹⁵⁰

B. A Second Flawed Solution: Pawar Could Not Consent to Removal on Behalf of MRA Because He Lacked Implied Authority to Initiate and Defend Suit Against a 50% Co-equal Shareholder

Another potential solution is a finding that Pawar lacked actual authority, express or implied under “general and active

¹⁴⁶ See, e.g., *Glisson Coker, Inc. v. Coker*, 581 S.E.2d 303, 305–06 (Ga. Ct. App. 2003) (adopting the *Stone* rule that where a derivative suit is possible, “an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over the corporate affairs.”); *Anmaco, Inc. v. Bohlken*, 16 Cal. Rptr. 2d 675, 679, 679 n.2 (Ct. App. 1993) (holding that a derivative, rather than direct, suit is the proper initiative for a president of a corporation to protect the interests of the company against a co-equal shareholder and co-director but reserving judgment on initiation and defense in emergency circumstances); *West View Hills, Inc.*, 160 N.E.2d at 623 (expressing reservation that “corporate interests may be prejudiced if not entirely destroyed” without presumptive presidential authority to bring or defend suit); *Stone*, 666 N.Y.S.2d at 295–96 (emphasizing that derivative actions are proper for suits against co-equal shareholders but noting that *West View Hills* does not apply this rule because it did not involve co-equal shareholder directors and it concerned an actual emergency).

¹⁴⁷ Cf. *West View Hills, Inc.*, 160 N.E.2d at 623.

¹⁴⁸ See generally *Conlee Constr. Co. v. Cay Constr. Co.*, 221 So.2d 792 (Fla. Dist. Ct. App. 1969); *Anmaco*, 16 Cal. Rptr. 2d at 675; *Glisson*, 581 S.E.2d at 303; *Elblum Holding Corp. v. Mintz*, 1 A.2d 204 (N.J. 1938); *Stone*, 666 N.Y.S.2d at 294.

¹⁴⁹ See *supra* notes 92–102 and accompanying text.

¹⁵⁰ See *supra* notes 145–49 and accompanying text.

management” powers, to remove suit based on the initiation-defense-removal analogy.¹⁵¹ An agent, such as a president of a corporation, acts with actual authority when she “take[s] action designated or implied in the principal’s manifestations to the agent and acts necessary or incidental to achieving the principal’s objectives, as the agent reasonably understands the principal’s manifestations and objectives when the agent determines how to act.”¹⁵² Sources vary on whether emergency authority is “implied” authority or inherent.¹⁵³ However, Swart’s argument that MRA’s presidential “general and active management” authority precluded removal, just as it precluded initiating suit against a co-equal director-shareholder without board approval, amounts to an argument against implied actual authority.¹⁵⁴ Likewise, Pawar’s counter-argument that “[n]othing is more fundamental than a corporation’s right to defend itself in litigation” responded to Swart’s claim by insinuating that the general management powers of a corporation powers imply the authority to respond to suit.¹⁵⁵

Pawar’s argument sees little support in the case law because most courts have not ruled that general management impliedly extends to defending suit against co-equal shareholder directors in court.¹⁵⁶ Some courts have found that general management of a corporation includes the ability to bring or defend suit on matters concerning ordinary business affairs of the corporation,¹⁵⁷

¹⁵¹ See *infra* notes 152–66 and accompanying text.

¹⁵² RESTATEMENT (THIRD) OF AGENCY: SCOPE OF ACTUAL AUTHORITY § 2.02 (AM. L. INST. 2006).

¹⁵³ See *supra* notes 133, 136.

¹⁵⁴ See Corrected Brief of Appellant, *supra* note 29, at 14–19; RESTATEMENT (THIRD) OF AGENCY § 2.02 (AM L. INST. 2006).

¹⁵⁵ Opening Response Brief of Appellees, *supra* note 69, at 9–10 (asserting the distinguishable emergency claim that a defendant corporation would face default judgment without the power to defend and remove itself).

¹⁵⁶ See *infra* notes 157–60 and accompanying text.

¹⁵⁷ See, e.g., *Covington Housing Dev. v. City of Covington*, 381 F. Supp. 427, 429–30 (E.D. Ky. 1974); *Chun v. Bd. of Trs.*, 952 P.2d 1215, 1228 (Haw. 1998); *Paloma Frocks, Inc. v. Shamokin Sportswear Corp.*, 147 N.E.2d 779, 781 (N.Y. 1958) (holding that a corporate president had authority to initiate arbitration where the board had previously contracted to an arbitration clause and “half of the directors of his corporation represent the other contracting party on his corporation’s board and presumably would not vote in favor of bringing the dispute before arbitrators.”); *Durfee & Canning v. Canning*, 82 A.2d 615, 619 (R.I. 1951) (determining that a president’s action against a defendant co-director who, with his wife, owned 50% of stock in the corporation, was entitled to bring

but only one notable case, *Lydia E. Pinkham Medicine Co. v. Gove*, has held that a “general grant of managerial power” amounts to the authority to bring suit against co-equal shareholder directors for tortious activity.¹⁵⁸ Of course, the district court in *Swart* also agreed that Pennsylvania law did not support an implied authority to initiate suits unrelated to the ordinary business of the corporation in the context of bylaw “general and active management” powers.¹⁵⁹ Considering the dearth of law supporting an implied presidential authority to initiate or defend suits pertaining to matters outside of ordinary business matters, a court applying the analogy could reason that such powers do not confer implied authority upon a president to remove to federal court.¹⁶⁰

The problem with this approach lies in the rationale that courts use to deny authority to initiate suit.¹⁶¹ Many courts have denied broad implied or inherent authority to bring suit against a co-equal shareholder for actions outside the scope of ordinary business because corporate officers could also bring derivative shareholder suits.¹⁶² As a Louisiana federal court explained in

suit to collect debts from the defendant because the collection of debts fell within the ordinary business of the corporation).

¹⁵⁸ *Lydia E. Pinkham Med. Co. v. Gove*, 9 N.E.2d 573, 578 (Mass. 1937) (holding that defendant family members who were co-directors and collectively owned 50% of company stock “violated their fiduciary obligations toward the plaintiff, and that they have acted in excess of their authority and used their official positions in the corporation to the detriment of its interests from motives of personal advantage and in order to compel a sale of the Pinkham stock.”).

¹⁵⁹ *See Swart v. Pawar*, No. 17-167, 2015 WL 7430795, at *13–15 (N.D.W.V. Nov. 19, 2015) (noting that the Pennsylvania court in *McGuire* “recognized the difference between a suit against another shareholder, and the typical sort of suit to collect third-party debts that one might pursue in the general and active management of a corporation.”).

¹⁶⁰ *See supra* notes 156–59 and accompanying text.

¹⁶¹ *See infra* notes 162–66 and accompanying text.

¹⁶² *See, e.g., Innovative Therapy Prods. v. Roe*, No. 98-1506, 1998 WL 405049, at *6 (W.D. La. July 17, 1998) (“The Court’s decision does not render a 50% shareholder powerless to stop the company’s remaining 50% shareholder from breaching his fiduciary responsibilities.”); *Ono v. Itoyama*, 884 F. Supp. 892, 895–900 (D.N.J. 1995); *Anmaco, Inc. v. Bohlken*, 16 Cal. Rptr. 2d 675, 679 (Ct. App. 1993) (“[Defendant] Bohlken is not only an equal director and shareholder, but is also Chief Executive Officer of the company. The proper vehicle for such a suit, when the gravamen of the complaint is injury to the corporation, is a shareholders’ derivative action.”); *Sterling Indus. v. Ball Bearing Pen Corp.*, 84 N.E.2d 790, 794 (N.Y. 1949) (“Plaintiff has an appropriate remedy by action in which it

Innovative Therapy Products v. Roe, courts prefer derivative suits in these circumstances because they do not permit plaintiff presidents to recover fees from the corporation unless they win on the merits against their co-equal shareholders.¹⁶³ One major premise of this reasoning is that plaintiff corporate presidents can still, with some added risk, recover for wrongs of defendant co-equal shareholder directors.¹⁶⁴ Using the initiation-defense-removal analogy to determine that presidents generally lack authority to remove to federal court because they have no authority to bring suit would appear to undermine this principle.¹⁶⁵ As the analogy was framed by the parties in *Swart*, a defendant who has no authority to initiate or remove also has no authority to defend suit on behalf of the corporation, let alone win on the merits.¹⁶⁶

C. Rethinking the Initiation-Defense-Removal Analogy's Role in Presidential Authority

A court could, however, combine portions of the reasoning outlined in Sections III.A–B to craft a novel way to deal with the challenges of removal authority.¹⁶⁷ This approach would temper the similarities between suit initiation, defense, and removal with a recognition that removal is, in many regards, unlike defending a case.¹⁶⁸ A court could accordingly determine that a corporate president possesses emergency authority to defend suit against a 50% co-equal shareholder co-director without concluding that

may obtain any necessary provisional remedy as well as prompt trial. That is by a stockholder's derivative action."); *Stone v. Frederick*, 666 N.Y.S.2d 294, 295 (App. Div. 1997) ("[W]here there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder's derivative action.") (citations omitted).

¹⁶³ See *Innovative Therapy Prods.*, 1998 WL 405049, at *6 ("A 50% shareholder should not be permitted to use the corporation's assets to attack his corporate partner. In a shareholder derivative suit, the claimant is only entitled to have the corporation pay his attorney fees if his action proves successful.").

¹⁶⁴ See *id.*

¹⁶⁵ See generally 2A FLETCHER ET AL., *supra* note 79, § 618.10.

¹⁶⁶ See Opening Response Brief of Appellees, *supra* note 69, at 9–10; see also *Innovative Therapy Prods.*, 1998 WL 405049, at *6.

¹⁶⁷ See *supra* Sections III.A–B; *infra* notes 168–73 and accompanying text.

¹⁶⁸ See Section II.A. *Contra* Opening Response Brief of Appellees, *supra* note 69, at 9–10.

removal is an exigency of such an emergency or a derivative of “general and active management” authority.¹⁶⁹ Such reasoning would allow a corporation’s president to defend the case on the merits in state court, just as an individual could recover on the merits in a derivative suit.¹⁷⁰ Scrapping the initiation-defense-removal analogy would gut the arguments of *Swart*,¹⁷¹ but it would also provide a method of reasoning that avoids the complications arising from their arguments.¹⁷²

The diversity context presents a possible challenge for this melded approach.¹⁷³ When removal power does diverge from the ability to defend and initiate suit, it usually does not betray the rationale of removal jurisdiction: the idea that defendants should be able to avoid potentially prejudicial state court fora.¹⁷⁴ For example, the bar to removal where a defendant is a resident of the state where a case is filed is consistent with this justification.¹⁷⁵

However, this solution does not betray the rationale of removal *ex ante*.¹⁷⁶ Boards of directors hold the power to authorize litigation, and they must act as one entity to do so.¹⁷⁷ Where, as in *Swart*, a board or a bylaw has not granted the president the power to unilaterally engage in litigation, the corporation generally maintains the sole power to authorize litigation in all matters except those within the ordinary business of the corporation.¹⁷⁸ Therefore, the board is the entity which acts on behalf of the corporation to decide whether or not a specific forum could prejudice the business.¹⁷⁹ There is no way to know whether a

¹⁶⁹ See *supra* Sections III.A–B.

¹⁷⁰ *Id.*

¹⁷¹ See Corrected Brief of Appellant, *supra* note 29, at 14–19; Opening Response Brief of Appellees, *supra* note 69, at 7–10.

¹⁷² See *supra* Sections III.A–B.

¹⁷³ See, e.g., *supra* Section II.A.

¹⁷⁴ See 16 MOORE ET AL., *supra* note 90, § 107.3; see also *supra* notes 96–99 and accompanying text.

¹⁷⁵ 28 U.S.C. § 1441(b) (2012); 16 MOORE ET AL., *supra* note 90, § 107.3.

¹⁷⁶ See *infra* notes 178–82 and accompanying text.

¹⁷⁷ See 2A FLETCHER ET AL., *supra* note 79, § 535.

¹⁷⁸ See, e.g., *Swart v. Pawar*, No. 17-167, 2015 WL 7430795, at *12–15 (N.D.W.V. Nov. 19, 2015); *Covington Housing Dev. v. City of Covington*, 381 F. Supp. 427, 429–30 (E.D. Ky. 1974). But see *Lydia E. Pinkham Med. Co. v. Gove*, 9 N.E.2d 573, 579–80 (Mass. 1937).

¹⁷⁹ See, e.g., 2A FLETCHER ET AL., *supra* note 79, § 535; *supra* note 175 and accompanying text.

forum could actually prejudice the corporation without such a board determination, as it, rather than the president, is the only body which can answer this question.¹⁸⁰ *Ex ante*; a solution which denies a president unilateral removal authority does not violate the rationale that removal rights are necessary to avoid state court prejudices.¹⁸¹ A rule that acknowledges the authority of corporate presidents to defend suit against co-equal co-director shareholders in emergency circumstances, but stops short of granting the authority to unilaterally consent to removal, would protect a corporation's financial interests without allowing presidents to benefit as individuals from assuming any more powers from boards of directors than necessary.¹⁸²

CONCLUSION

Swart v. Pawar presented a novel question of law: does the president of a corporation with "general and active management" powers have the authority to unilaterally consent to removal on behalf of the corporation in a suit against a 50% co-equal shareholder and co-director?¹⁸³ The District Court for the Northern District of West Virginia and the Fourth Circuit did not directly address this question,¹⁸⁴ but the parties raised interesting arguments analogizing the authority to consent to removal to the presidential authority to initiate and defend.¹⁸⁵ Although the analogy of removal to suit initiation and defense is imperfect, it is a somewhat useful tool for evaluating case law on litigative authority in corporate litigation similar to that of *Swart*.¹⁸⁶ An

¹⁸⁰ See, e.g., 2A FLETCHER ET AL., *supra* note 79, § 535; *supra* notes 175–77 and accompanying text.

¹⁸¹ See 16 MOORE ET AL., *supra* note 90, § 107.3 (outlining the rationale); *supra* notes 177–80 and accompanying text.

¹⁸² See 2A FLETCHER ET AL., *supra* note 79, § 535 (discussing the authority of boards of directors over litigative decisions); *supra* notes 167–82 and accompanying text. Presidents would stand to personally benefit from an assumption of board removal authority under circumstances similar to those of the *Swart* case: where they, as individual defendants, want to remove to federal court and need codefendant corporations' assent to do so. See generally *Swart v. Pawar*, 684 F. App'x 306 (4th Cir. 2017).

¹⁸³ See *supra* Introduction.

¹⁸⁴ See *supra* Sections I.A–B.

¹⁸⁵ See *supra* Parts I–II.

¹⁸⁶ See *supra* Parts II–III.

evaluation of presidential litigative authority in co-equal shareholder co-director suits further shows that the analogy of initiation and defense to removal has pitfalls and strengths within the corporate context.¹⁸⁷ The Supreme Court may have declined to hear the case and issue a precise rule on removal in *Swart*,¹⁸⁸ but future courts could reasonably resolve the matter by recognizing the flaws of the initiation-defense-removal analogy and holding that a defendant president can defend a case in emergency circumstances without assuming the authority to unilaterally consent to removal.¹⁸⁹

¹⁸⁷ See *supra* Sections III.A–B.

¹⁸⁸ *Swart v. Pawar*, No. 1:14-CV-10, 2015 WL 8056115, at *1 (N.D.W.V. Dec. 4, 2015), *aff'd per curiam*, 684 F. App'x 306 (4th Cir. 2017), *cert. denied*, No. 17-167, 2017 WL 3324960 (2017).

¹⁸⁹ See Section III.C.