

(22)

ARTICLES OF AMENDMENT AND RESTATEMENT

OF

AMERICAN CAMPUS COMMUNITIES, INC.

AMERICAN CAMPUS COMMUNITIES, INC., a Maryland corporation having its principal office in the State of Maryland at 300 East Lombard Street, Baltimore, Maryland 21202 (hereinafter, the "Corporation"), hereby certifies to the Department of Assessments and Taxation of the State of Maryland that:

FIRST: The Corporation desires to amend and restate its charter as currently in effect.

SECOND: The provisions of the charter which are now in effect and as amended hereby, stated in accordance with the Maryland General Corporation Law ("Charter"), are as follows:

ARTICLE I

NAME

The name of the Corporation is American Campus Communities, Inc.

ARTICLE II

DURATION

The duration of the Corporation is perpetual.

ARTICLE III

PURPOSES AND POWERS

The purposes for which the Corporation is formed are to conduct any business for which corporations may be organized under the laws of the State of Maryland including, but not limited to, the following: (i) to acquire, hold, own, develop, construct, improve, maintain, operate, sell, lease, transfer, encumber, convey, exchange and otherwise dispose of or deal with real and personal property directly or through one or more subsidiaries or affiliates; (ii) to enter into any partnership, joint venture or other similar arrangement to engage in any of the foregoing; and (iii) in general, to possess and exercise all the purposes, powers, rights and privileges granted to, or conferred upon, corporations by the laws of the State of Maryland now or hereafter in force, and to exercise any powers suitable, convenient or proper for the accomplishment of any of the purposes herein enumerated, implied or incidental to the powers or purposes herein specified, or which at any time may appear conducive to or expedient for the accomplishment of any such purposes.

STATE OF MARYLAND

I hereby certify that this is a true and complete copy of the page document on file in this office. DATED: 7-13-72

STATE DEPARTMENT OF ASSESSMENTS AND TAXATION:

BY: [Signature], Custodian

This stamp replaces our previous certification system. Effective: 6/95

The foregoing shall, except where otherwise expressed, in no way be limited or restricted by reference to or inference from the terms of any other clause of this or any other provision of this Charter, or of any amendment hereto or restatement hereof, and shall each be regarded as independent, and shall each be construed as powers as well as purposes.

ARTICLE IV

PRINCIPAL OFFICE AND RESIDENT AGENT

The address of the principal office of the Corporation in the State of Maryland is 300 East Lombard Street, Baltimore, Maryland 21202. The name of the resident agent of the Corporation in the State of Maryland is The Corporation Trust Incorporated, 300 East Lombard Street, Baltimore, Maryland 21202. Said resident agent is a Maryland corporation.

ARTICLE V

BOARD OF DIRECTORS

The initial number of directors of the Corporation shall be three (3). From and after the date hereof, the number of directors of the Corporation shall be fixed by, or in the manner provided in, the Bylaws of the Corporation, and shall be increased or decreased from time to time in such manner as may be prescribed in the Bylaws, but in no event shall there be less than three (3) or more than fifteen (15) directors. The names of the initial directors of the Corporation, who shall serve until their successors are duly elected and qualified are:

William C. Bayless, Jr.
Brian B. Nickel
Mark J. Hager

ARTICLE VI

AUTHORIZED STOCK

Section 6.1 Total Capitalization. The aggregate number of shares of all classes of capital stock that the Corporation shall have authority to issue is One Billion (1,000,000,000) shares, consisting of (i) Two Hundred Million (200,000,000) shares of preferred stock, par value \$0.01 per share (the "Preferred Stock"); and (ii) Eight Hundred Million (800,000,000) shares of common stock, par value \$0.01 per share (the "Common Stock"). The aggregate par value of all of the authorized shares of all classes of capital stock having par value is Ten Million Dollars (\$10,000,000).

Section 6.2 Preferred Stock. The Preferred Stock may be issued from time to time in one or more series as authorized by the Board of Directors. Prior to the issuance of shares of each such series, the Board of Directors, by resolution, shall fix the number of shares to be included in each series, and the terms, rights, restrictions and qualifications of the shares of each series. The authority of the Board of Directors with respect to each series shall include, but not be limited to, determination of the following:

(a) The designation of the series, which may be by distinguishing number, letter or title.

(b) The dividend rate on the shares of the series, if any, whether any dividends shall be cumulative and, if so, from which date or dates, and the relative rights of priority, if any, of payment of dividends on shares of the series.

(c) The redemption rights, including conditions and the price or prices, if any, for shares of the series.

(d) The terms and amounts of any sinking fund for the purchase or redemption of shares of the series.

(e) The rights of the shares of the series in the event of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Corporation, and the relative rights of priority, if any, of payment of shares of the series.

(f) Whether the shares of the series shall be convertible into shares of any other class or series, or any other security, of the Corporation or any other entity, and, if so, the specification of such other class or series of such other security, the conversion price or prices or rate or rates, any adjustments thereof, the date or dates on which such shares shall be convertible and all other terms and conditions upon which such conversion may be made.

(g) Restrictions on the issuance of shares of the same series or of any other class or series.

(h) The voting rights, if any, of the holders of shares of the series.

(i) Any other relative rights, preferences and limitations on that series.

Subject to the express provisions of any other series of Preferred Stock then outstanding, and notwithstanding any other provision of this Charter, the Board of Directors may increase or decrease (but not below the number of shares of such series then outstanding) the number of shares, or alter the designation or classify or reclassify any unissued shares of a particular series of Preferred Stock, by fixing or altering, in one or more respects, from time to time before issuing the shares, the terms, rights, restrictions and qualifications of the shares of any such series of Preferred Stock.

Section 6.3 Common Stock.

6.3.1 Common Stock Subject to Terms of Preferred Stock. The Common Stock shall be subject to the express terms of any series of Preferred Stock.

6.3.2 Dividend Rights. The holders of Common Stock shall be entitled to receive such dividends as may be declared by the Board of Directors out of funds legally available therefor.

6.3.3 Rights Upon Liquidation. In the event of any voluntary or involuntary liquidation, dissolution or winding up, or any distribution of the assets, of the Corporation, the aggregate assets available for distribution to holders of shares of Common Stock shall be determined in accordance with applicable law. Each holder of shares of Common Stock shall be entitled to receive, ratably with each other holder of shares of Common Stock, that portion of such aggregate assets available for distribution as the number of shares of the outstanding Common Stock held by such holder bears to the total number of shares of outstanding Common Stock then outstanding.

6.3.4 Voting Rights. Except as may be provided in this Charter, and subject to the express terms of any series of Preferred Stock, the holders of shares of Common Stock shall have the exclusive right to vote on all matters (as to which a common stockholder shall be entitled to vote pursuant to applicable law) at all meetings of the stockholders of the Corporation, and shall be entitled to one (1) vote for each share of Common Stock entitled to vote at such meeting.

ARTICLE VII

RESTRICTION ON TRANSFER AND OWNERSHIP OF SHARES

Section 7.1 Definitions. For the purposes of this Article VII, the following terms shall have the following meanings:

"Articles of Incorporation" shall mean this Charter, as the same may be amended and/or restated from time to time.

"Beneficial Ownership" shall mean ownership of Equity Shares by a Person who is or would be treated as an owner of such Equity Shares either actually or constructively through the application of Section 544 of the Code, as modified by Sections 856(h)(1)(B) and 856(h)(3) of the Code. The terms "Beneficial Owner," "Beneficially Own," "Beneficially Owns" and "Beneficially Owned" shall have the correlative meanings. For purposes of determining the percentage ownership of Equity Shares by any Person, Equity Shares that may be acquired upon conversion, exchange or exercise of any securities of the Corporation or any securities of American Campus Communities Operating Partnership LP directly or constructively held by such Person, but not Equity Shares issuable with respect to the conversion, exchange or exercise of securities of the Corporation or securities of American Campus Communities Operating Partnership LP held by other Persons, shall be deemed to be outstanding prior to conversion, exchange or exercise.

"Charitable Beneficiary" shall mean one or more beneficiaries of a Trust, as determined pursuant to Section 7.3.6.

"Code" shall mean the Internal Revenue Code of 1986, as amended. All section references to the Code shall include any successor provisions thereof as may be adopted from time to time.

"Common Stock" shall mean that Common Stock that may be issued pursuant to Article VI of the Articles of Incorporation.

"Common Stock Ownership Limit" shall mean 9.8% (by value or by number of shares, whichever is more restrictive) of the outstanding Common Stock, excluding any such outstanding Common Stock which is not treated as outstanding for federal income tax purposes. The number and value of shares of outstanding Common Stock shall be determined by the Board of Directors in good faith, which determination shall be conclusive for all purposes hereof.

"Constructive Ownership" shall mean ownership of Equity Shares by a Person who is or would be treated as an owner of such Equity Shares either actually or constructively through the application of Section 318 of the Code, as modified by Section 856(d)(5) of the Code. The terms "Constructive Owner," "Constructively Own," "Constructively Owns" and "Constructively Owned" shall have the correlative meanings.

"Corporation" shall have the meaning set forth in the preamble to the Articles of Incorporation.

"Equity Shares" shall mean shares of the Corporation of all classes or series, including, without limitation, Common Stock and Preferred Stock.

"Equity Shares Ownership Limit" shall mean 9.8% by value of the aggregate of the outstanding Equity Shares, excluding any such outstanding Equity Share which is not treated as outstanding for federal income tax purposes. The value of the outstanding Equity Shares shall be determined by the Board of Directors in good faith, which determination shall be conclusive for all purposes hereof.

"Individual" shall mean an individual, a trust qualified under Section 401(a) or 501(c)(17) of the Code, a portion of a trust permanently set aside for or to be used exclusively for the purposes described in Section 642(c) of the Code, or a private foundation within the meaning of Section 509(a) of the Code, provided that a trust described in Section 401(a) of the Code and exempt from tax under Section 501(a) of the Code shall be excluded from this definition.

"Initial Date" shall mean the date of the first business day following the date the Corporation first issues Common Stock pursuant to its effective registration statement on Form S-11, as amended (Registration No.: 333-114813).

"IRS" shall mean the United States Internal Revenue Service.

"Market Price" shall mean the last reported sales price reported on the New York Stock Exchange of the Common Stock on the trading day immediately preceding the relevant date, or if the Common Stock is not then traded on the New York Stock Exchange, the last reported sales price of the Common Stock on the trading day immediately preceding the relevant date as reported on any exchange or quotation system over which the Common Stock may be traded, or if the Common Stock is not then traded over any exchange or quotation system, then the market price of the Common Stock on the relevant date as determined in good faith by the Board of Directors of the Corporation.

"Ownership Limit" shall mean either or both the Common Stock Ownership Limit and the Equity Shares Ownership Limit.

"Person" shall mean an Individual, corporation, partnership, limited liability company, estate, trust, association, private foundation within the meaning of Section 509(a) of the Code, joint stock company or other entity; but does not include an underwriter acting in a capacity as such in a public offering of shares of Common Stock, provided that the ownership of such shares of Common Stock by such underwriter would not result in the Corporation being "closely held" within the meaning of Section 856(h) of the Code, or otherwise result in the Corporation failing to qualify as a REIT.

"Purported Beneficial Transferee" shall mean, with respect to any purported Transfer (or other event) which results in a transfer to a Trust, as provided in Section 7.2.2, the Purported Record Transferee, unless the Purported Record Transferee would have acquired or owned Equity Shares for another Person who is the beneficial transferee or owner of such Equity Shares, in which case the Purported Beneficial Transferee shall be such Person.

"Purported Record Transferee" shall mean, with respect to any purported Transfer (or other event) which results in a transfer to a Trust, as provided in Section 7.2.2, the record holder of the Equity Shares if such Transfer had been valid under Section 7.2.1.

"REIT" shall mean a real estate investment trust under Sections 856 through 860 of the Code.

"Restriction Termination Date" shall mean the first day on which the Board of Directors of the Corporation determines that it is no longer in the best interests of the Corporation to attempt to, or continue to, qualify as a REIT.

"Transfer" shall mean any direct or indirect issuance, sale, transfer, gift, assignment, devise, other disposition of Equity Shares as well as any other event that causes any Person to Beneficially Own or Constructively Own Equity Shares, including (i) the granting of any option or entering into any agreement for the sale, transfer or other disposition of Equity Shares or (ii) the sale, transfer, assignment or other disposition of any securities (or rights convertible into or exchangeable for Equity Shares), whether voluntary or involuntary, whether such transfer has occurred of record or beneficially or Beneficially or Constructively (including but not limited to transfers of interests in other entities which result in changes in Beneficial or Constructive Ownership of Equity Shares), and whether such transfer has occurred by operation of law or otherwise.

"Trust" shall mean each of the trusts provided for in Section 7.3.

"Trustee" shall mean any Person unaffiliated with the Corporation, or a Purported Beneficial Transferee, or a Purported Record Transferee, that is appointed by the Corporation to serve as trustee of a Trust.

Section 7.2 Restriction on Ownership and Transfers.

7.2.1 From the Initial Date and prior to the Restriction Termination Date:

(a) except as provided in Section 7.9, no Person shall Beneficially Own Common Stock in excess of the Common Stock Ownership Limit or Beneficially Own Equity Shares in excess of the Equity Shares Ownership Limit;

(b) except as provided in Section 7.9, no Person shall Constructively Own Common Stock in excess of the Common Stock Ownership Limit or Constructively Own Equity Shares in excess of the Equity Shares Ownership Limit; and

(c) no Person shall Beneficially or Constructively Own Equity Shares to the extent that such Beneficial or Constructive Ownership would result in the Corporation being "closely held" within the meaning of Section 856(h) of the Code, or otherwise failing to qualify as a REIT (including but not limited to ownership that would result in the Corporation owning (actually or Constructively) an interest in a tenant that is described in Section 856(d)(2)(B) of the Code if the income derived by the Corporation (either directly or indirectly through one or more partnerships or limited liability companies) from such tenant would cause the Corporation to fail to satisfy any of the gross income requirements of Section 856(c) of the Code).

7.2.2 If, during the period commencing on the Initial Date and prior to the Restriction Termination Date, any Transfer occurs that, if effective, would result in any Person Beneficially or Constructively Owning Equity Shares in violation of Section 7.2.1, (i) then that number of Equity Shares that otherwise would cause such Person to violate Section 7.2.1 (rounded up to the nearest whole share) shall be automatically transferred to a Trust for the benefit of a Charitable Beneficiary, as described in Section 7.3, effective as of the close of business on the business day prior to the date of such Transfer or other event, and such Purported Beneficial Transferee shall thereafter have no rights in such shares or (ii) if, for any reason, the transfer to the Trust described in clause (i) of this sentence is not automatically effective as provided therein to prevent any Person from Beneficially or Constructively Owning Equity Shares in violation of Section 7.2.1, then the Transfer of that number of Equity Shares that otherwise would cause any Person to violate Section 7.2.1 shall, subject to Section 7.12, be void ab initio, and the Purported Beneficial Transferee shall have no rights in such shares.

7.2.3 Subject to Section 7.12 and notwithstanding any other provisions contained herein, during the period commencing on the Initial Date and prior to the Restriction Termination Date, any Transfer of Equity Shares that, if effective, would result in the capital stock of the Corporation being beneficially owned by less than 100 Persons (determined without reference to any rules of attribution) shall be void ab initio, and the intended transferee shall acquire no rights in such Equity Shares.

7.2.4 It is expressly intended that the restrictions on ownership and Transfer described in this Section 7.2 shall apply to restrict the rights of any members or partners in limited liability companies or partnerships to exchange their interest in such entities for Equity Shares.

Section 7.3 Transfers of Equity Shares in Trust.

7.3.1 Upon any purported Transfer or other event described in Section 7.2.2, such Equity Shares shall be deemed to have been transferred to the Trustee in his capacity as trustee of a Trust for the exclusive benefit of one or more Charitable Beneficiaries. Such transfer to the Trustee shall be deemed to be effective as of the close of business on the business day prior to the purported Transfer or other event that results in a transfer to the Trust pursuant to Section 7.2.2. The Trustee shall be appointed by the Corporation and shall be a Person unaffiliated with the Corporation, any Purported Beneficial Transferee, and any Purported Record Transferee. Each Charitable Beneficiary shall be designated by the Corporation as provided in Section 7.3.6.

7.3.2 Equity Shares held by the Trustee shall be issued and outstanding Equity Shares of the Corporation. The Purported Beneficial Transferee or Purported Record Transferee shall have no rights in the Equity Shares held by the Trustee. The Purported Beneficial Transferee or Purported Record Transferee shall not benefit economically from ownership of any shares held in trust by the Trustee, shall have no rights to dividends and shall not possess any rights to vote or other rights attributable to the Equity Shares held in the Trust.

7.3.3 The Trustee shall have all voting rights and rights to dividends with respect to Equity Shares held in the Trust, which rights shall be exercised for the exclusive benefit of the Charitable Beneficiary. Any dividend or distribution paid prior to the discovery by the Corporation that Equity Shares have been transferred to the Trustee shall be paid to the Trustee upon demand by the Purported Record Transferee, and any dividend or distribution declared but unpaid shall be paid when due to the Trustee with respect to such Equity Shares. Any dividends or distributions so paid over to the Trustee shall be held in trust for the Charitable Beneficiary. The Purported Record Transferee and Purported Beneficial Transferee shall have no voting rights with respect to the Equity Shares held in the Trust and, subject to the Maryland General Corporation Law, as amended from time to time, or any successor statute thereto (the "MGCL"), effective as of the date the Equity Shares has been transferred to the Trustee, the Trustee shall have the authority (at the Trustee's sole discretion) (i) to rescind as void any vote cast by a Purported Record Transferee with respect to such Equity Shares prior to the discovery by the Corporation that the Equity Shares has been transferred to the Trustee and (ii) to recast such vote in accordance with the desires of the Trustee acting for the benefit of the Charitable Beneficiary; provided, however, that if the Corporation has already taken irreversible corporate action, then the Trustee shall not have the authority to rescind and recast such vote. Notwithstanding the provisions of this Article VII, until the Corporation has received notification that the Equity Shares has been transferred into a Trust, the Corporation shall be entitled to rely on its share transfer and other stockholder records for purposes of preparing lists of stockholders entitled to vote at meetings, determining the validity and authority of proxies and otherwise conducting votes of stockholders.

7.3.4 Within twenty (20) days of receiving notice from the Corporation that Equity Shares have been transferred to the Trust, the Trustee of the Trust shall sell the Equity Shares held in the Trust to a person, designated by the Trustee, whose ownership of the Equity Shares will not violate the ownership limitations set forth in Section 7.2.1. Upon such sale, the interest of the Charitable Beneficiary in the Equity Shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Purported Record Transferee and to the Charitable Beneficiary as provided in this Section 7.3.4. The Purported Record Transferee shall

receive the lesser of (i) the price paid by the Purported Record Transferee for the Equity Shares in the transaction that resulted in such transfer to the Trust (or, if the event which resulted in the transfer to the Trust did not involve a purchase of such Equity Shares at Market Price, the Market Price of such Equity Shares on the day of the event which resulted in the transfer of such Equity Shares to the Trust) and (ii) the price per share received by the Trustee (net of any commissions and other expenses of sale) from the sale or other disposition of the Equity Shares held in the Trust. Any net sales proceeds in excess of the amount payable to the Purported Record Transferee shall be immediately paid to the Charitable Beneficiary, together with any dividends or other distributions thereon. If, prior to the discovery by the Corporation that shares of such Equity Shares have been transferred to the Trustee, such Equity Shares are sold by a Purported Record Transferee then (x) such Equity Shares shall be deemed to have been sold on behalf of the Trust and (y) to the extent that the Purported Record Transferee received an amount for such Equity Shares that exceeds the amount that such Purported Record Transferee was entitled to receive pursuant to this Section 7.3.4, such excess shall be paid to the Trustee upon demand.

7.3.5 Equity Shares transferred to the Trustee shall be deemed to have been offered for sale to the Corporation, or its designee, at a price per share equal to the lesser of (i) the price paid by the Purported Record Transferee for the Equity Shares in the transaction that resulted in such transfer to the Trust (or, if the event which resulted in the transfer to the Trust did not involve a purchase of such Equity Shares at Market Price, the Market Price of such Equity Shares on the day of the event which resulted in the transfer of such Equity Shares to the Trust) and (ii) the Market Price on the date the Corporation, or its designee, accepts such offer. The Corporation shall have the right to accept such offer until the Trustee has sold the Equity Shares held in the Trust pursuant to Section 7.3.4. Upon such a sale to the Corporation, the interest of the Charitable Beneficiary in the Equity Shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Purported Record Transferee and any dividends or other distributions held by the Trustee with respect to such Equity Shares shall thereupon be paid to the Charitable Beneficiary.

7.3.6 By written notice to the Trustee, the Corporation shall designate one or more nonprofit organizations to be the Charitable Beneficiary of the interest in the Trust such that (i) the Equity Shares held in the Trust would not violate the restrictions set forth in Section 7.2.1 in the hands of such Charitable Beneficiary and (ii) each Charitable Beneficiary is an organization described in Sections 170(b)(1)(A), 170(c)(2) and 501(c)(3) of the Code.

Section 7.4 Remedies For Breach. If the Board of Directors of the Corporation or a committee thereof or other designees if permitted by law shall at any time determine in good faith that a Transfer or other event has taken place in violation of Section 7.2 or that a Person intends to acquire, has attempted to acquire or may acquire beneficial ownership (determined without reference to any rules of attribution), Beneficial Ownership or Constructive Ownership of any shares of the Corporation in violation of Section 7.2, the Board of Directors or a committee thereof or other designees if permitted by law shall take such action as it deems or they deem advisable to refuse to give effect or to prevent such Transfer, including, but not limited to, causing the Corporation to redeem Equity Shares, refusing to give effect to such Transfer on the books of the Corporation or instituting proceedings to enjoin such Transfer; provided, however, that any Transfers (or, in the case of events other than a Transfer, ownership or Constructive Ownership or Beneficial Ownership) in violation of Section 7.2.1, shall

automatically result in the transfer to a Trust as described in Section 7.2.2 and any Transfer in violation of Section 7.2.3 shall automatically be void ab initio irrespective of any action (or non-action) by the Board of Directors.

Section 7.5 Notice of Restricted Transfer. Any Person who acquires or attempts to acquire shares in violation of Section 7.2, or any Person who is a Purported Beneficial Transferee such that an automatic transfer to a Trust results under Section 7.2.2, shall immediately give written notice to the Corporation of such event and shall provide to the Corporation such other information as the Corporation may request in order to determine the effect, if any, of such Transfer or attempted Transfer on the Corporation's status as a REIT.

Section 7.6 Owners Required to Provide Information. From the Initial Date and prior to the Restriction Termination Date, each Person who is a beneficial owner or Beneficial Owner or Constructive Owner of Equity Shares and each Person (including the stockholder of record) who is holding Equity Shares for a beneficial owner or Beneficial Owner or Constructive Owner shall, on demand, provide to the Corporation a completed questionnaire containing the information regarding their ownership of such shares, as set forth in the regulations (as in effect from time to time) of the U.S. Department of Treasury under the Code. In addition, each Person who is a beneficial owner or Beneficial Owner or Constructive Owner of Equity Shares and each Person (including the stockholder of record) who is holding Equity Shares for a beneficial owner or Beneficial Owner or Constructive Owner shall, on demand, be required to disclose to the Corporation in writing such information as the Corporation may request in order to determine the effect, if any, of such stockholder's actual and constructive ownership of Equity Shares on the Corporation's status as a REIT and to ensure compliance with the Ownership Limit, or as otherwise permitted by the Board of Directors of the Corporation.

Section 7.7 Remedies Not Limited. Nothing contained in this Article VII (but subject to Section 7.12) shall limit the authority of the Board of Directors to take such other action as it deems necessary or advisable to protect the Corporation and the interests of its stockholders by preservation of the Corporation's status as a REIT.

Section 7.8 Ambiguity. In the case of an ambiguity in the application of any of the provisions of this Article VII, including any definition contained in Section 7.1, the Board of Directors of the Corporation shall have the power to determine the application of the provisions of this Article VII with respect to any situation based on the facts known to it (subject, however, to the provisions of Section 7.12). In the event Article VII requires an action by the Board of Directors and the Articles of Incorporation fail to provide specific guidance with respect to such action, the Board of Directors shall have the power to determine the action to be taken so long as such action is not contrary to the provisions of this Article VII. Absent a decision to the contrary by the Board of Directors (which the Board may make in its sole and absolute discretion), if a Person would have (but for the remedies set forth in Section 7.2.2) acquired Beneficial or Constructive Ownership of Equity Shares in violation of Section 8.2.1, such remedies (as applicable) shall apply first to the Equity Shares which, but for such remedies, would have been actually owned by such Person, and second to Equity Shares which, but for such remedies, would have been Beneficially Owned or Constructively Owned (but not actually owned) by such Person, pro rata among the Persons who actually own such Equity Shares based upon the relative number of Equity Shares held by each such Person.