The arbitration hearing in this matter was heard May 12, 2020, by Zoom video. Having reviewed all the evidence, amicus briefs, and the briefs of the parties, I now issue this ruling.

Statement of Facts

1. Tenant A and Tenant B, (collectively, Tenants) are sisters and tenants in a residential unit at apartment complex. Their tenancy under their leases runs until August 16, 2020, and requires monthly payment of rent.

2. (Landlord) is a BYU approved off campus housing provider.

3. Landlord is obligated under a contract with BYU Off Campus Housing Office which governs Landlord’s duties as a BYU approved housing provider.

4. In January 2020 the world watched as news hit of a coronavirus in Wuhan, China, and as hundreds, then thousands of Chinese citizens were reported to be infected. Images of a vigorous lockdown of millions of people in Wuhan were shown on tv. By late January the World Health Organization declared the virus a global health emergency. On January 31, the Trump administration declared the virus a public health emergency and issued an order quarantining Americans who had recently been in certain parts of China. By late February the virus was rampant in Italy and Italy entered stringent lockdown orders for people residing there. In late February a virus outbreak occurred in Kirkland, Washington and it was clear the virus now was in the US. On March 11, 2020, the World Health Organization declared the virus a worldwide pandemic. By March 12, 2020, more than 1200 cases of the virus had been diagnosed in the US and people were dying. On March 13, 2020, the Trump administration declared the virus a national emergency.

5. Subsequently the impact of the virus spread throughout the world. Governmental entities around the world and in the US entered stay-at-home and similar orders. Schools around the country were closed. The NCAA March Madness basketball tournament was cancelled. Major League Baseball, the NBA and NHL Hockey each were cancelled. Restaurants, museums, amusement parks, swimming pools, workout facilities, spas, and hair salons all were closed. The virus, now named Covid-19, has been dominating the daily news since early March.

6. As this was unfolding across the world, BYU made decisions with respect to its students, classes and campus. On March 12, 2020, it announced that all classes were cancelled for several days, and that classes would resume on March 18 through remote instruction. Students were “strongly encouraged” to return home and BYU allowed all students in on campus housing to be released from their lease contracts with the university. At that time BYU closed the campus for essentially all activities.
On March 14, BYU 2020, the BYU Off Campus Housing Office (OCHO) issued a notice to all BYU approved housing providers responding to the question raised by many students of whether they would be let out of their off campus housing contracts. That notice advised:

The OCHO recognizes that the contract is a legally binding agreement between the landlord and the student. However, the OCHO strongly encourages landlords and their agents to consider the value of releasing students. BYU has encouraged students to consider leaving campus and return home to finish Winter semester through remote coursework.

When Tenants left the apartment and continuing through the date of the hearing for this arbitration, individuals with serious heart conditions are designated “high risk individuals” by the State of Utah and as “people who are at higher risk for severe illness” by the federal Centers for Disease Control and Prevention and directed to follow specific and particularly strict health guidelines during the pandemic, even as general restrictions are lifted.

In October, 2019, in order to live within walking distance of their BYU classes and part-time jobs, Tenants moved from their home in Provo [redacted] miles from BYU campus and rented and moved into Landlord’s property. Before the pandemic Tenants intended to occupy and live in the apartment through the spring and summer terms, during which both intended to work on campus, and Tenant A intended to attend classes. Each intended to secure a contract to remain in the apartment this coming fall semester.

Tenant A has serious ongoing medical conditions including two different heart issues and she is dealing with the effects of Lyme disease. Verification existed before the pandemic in the form of a letter from the BYU Accessibility Center and was supplemented for these proceedings by a letter from Tenant A’s doctor. Tenants and Tenants’ parents reasonably perceived that these medical conditions directly and specifically put Tenant A at more critical risk if she contracted the Covid-19 virus.

In order to protect Tenant A’s health in particular, Tenants left the apartment and Tenants self-isolated at their family home in Provo immediately after BYU closed its campus. They moved the weekend of March 14, 2020.

Tenants had been receiving assistance paying rent from their father, who lost his job and received his final paycheck March 13, 2020. He made 2/3s of the family income.

Tenant A remains employed part-time at BYU, working remotely. Tenant B lost her part-time job at BYU [redacted] because the BYU campus closed.

On March 16, 2020, Tenant’s father verbally sought termination of Tenant’s contracts in a phone call to Landlord. Landlord did not accept the termination request.

On March 23, 2020, Tenants provided written notice to Landlord that Tenants were seeking termination of their contracts. In their notice, Tenants cited the serious illness
provision in paragraph 23B of the contract and heightened risks of contracting the serious illness due to the pandemic and did not directly describe Tenant A’s particular susceptibility to the threat of the serious illness. Landlord did not accept Tenants’ request to terminate the contract.

16. On March 30, 2020, Tenants retrieved the remainder of their belongings from the apartment, which had already been vacated by Tenants’ roommates, and cleaned the apartment and vacated.

17. On March 31, 2020, Tenant B ceased self-isolating to travel to Colorado to assist Tenants’ father with response to a sudden illness and death in the extended family.

18. Tenants’ departure from the student housing setting was prompt and in good faith primarily to protect Tenant A’s health in light of her serious underlying health conditions, and not as pretext to avoid their obligations to pay rent.

19. Tenants paid rent for March but neither has paid rent for months after March 2020.

Legal Analysis

Tenants assert that they should be released from their leases because paragraph 23B of the contract allows a student tenant to terminate the lease due to serious illness. They assert the particular need for Tenant A to avoid the threat of contracting Covid-19 in the environment of an apartment complex. They also claim they should be released because their father’s loss of his employment constitutes a catastrophic loss. Tenants also assert that their primary purpose, to live within walking distance of in-person classes and on-campus jobs, has been frustrated.

Landlord asserts that paragraph 23B does not apply because Tenants did not inform Landlord of Tenant A’s underlying health conditions in detail until they requested arbitration, and that even if they had, regardless of Tenant A’s health conditions, Tenants should honor the commitments they made when they signed the contracts.

Paragraph 23B analysis

Leaves School.

Paragraph 23B allows a tenant to terminate the lease “[i]f the student leaves school due to a verified unforeseeable and unexpected . . . serious illness.” The critical language is that Tenant must leave school “due to . . . a serious illness.” Giving this phrase its plain meaning, leaving school means leaving the BYU campus and the student housing setting. In order to be a BYU approved off campus housing provider, Landlord must contract only with “eligible single students” as defined by BYU off campus housing; therefore, all Landlord’s tenants at the apartment complex are students and the apartment complex thus becomes an important part of the school setting. When the pandemic became a pronounced problem, BYU closed its campus. Thus Tenants could not be at school, in the sense that they could not be on campus attending classes, the library or other campus activities, but they had not entirely left the school setting while they remained in student housing. Tenant A became alarmed at residing in such close
contact with many other students and left school, namely, the closed BYU campus and the student housing setting.¹

Serious Illness.

Paragraph 23B allows a tenant to terminate the lease “[i]f the student leaves school due to a verified unforeseeable and unexpected . . . serious illness.” The critical language is that Tenant must leave school “due to . . . a serious illness.” Giving this phrase its plain meaning, leaving school “due to” a serious illness does not require that the tenant personally is experiencing a serious illness such as personally having Covid-19. Nor does it require that the tenant have a specified relationship with a person who has a serious illness. On the other hand, this language also does not mean that any tenant under the BYU OCHO lease form may claim the benefit of this broad language and terminate his/her contract because of the existence of the Covid-19 virus.

For a termination to be “due to” a serious illness, the serious illness at issue must have a direct, personal effect on the tenant. Further, what constitutes a serious illness or threat of serious illness to one person may not be a serious illness to another person. The circumstances of each person must be evaluated on the basis of that person’s individual circumstances with regard to the serious illness. The general difficulties of the Covid-19 pandemic which are significant and causing disruption worldwide are not a basis to terminate student tenancies under the serious illness provision of paragraph 23B. A tenant seeking termination must leave due to a direct, personal effect on that tenant from a serious illness.

Tenant A has serious health issues, including two different heart irregularities which render her physical constitution weaker than most young adults in her peer group and leave her significantly compromised should she encounter a virus like Covid-19. She also has Lyme disease, a particularly difficult disease. When the pandemic became a pronounced problem, she became alarmed at residing in such close contact with other students and left school, namely, the student housing setting.² Her father attempted to negotiate termination of her contract because of her existing health issues. She asserts today, given her health conditions, she would be at grave risk if she contracts the virus and has been diligent in self-isolating upon her return to the family home. Tenant A left the apartment and returned home because she genuinely and reasonably feared for her personal health and safety if she remained in the apartment. Her termination under paragraph 23B was proper and timely. She promptly left the proximity of the school and the student housing setting “due to . . . a serious illness” within the meaning of that paragraph. She is released from her tenancy under paragraph 23B.

Tenant B left the apartment at the same time as Tenant A. There is nothing unreasonable about Tenant B’s decision to return home as well; no individual who left the setting of student housing to help protect their own and others’ health can be said to have made an unreasonable

¹“Looking at the terms of the contract as a whole and giving meaning to each provision,” Jones v. ERA Brokers Consol., 6 P.3d 1129, 1132 (Utah 2000), Tenant A clearly “left school” by leaving the closed campus and the student housing setting “due to... serious Illness,” i.e., to avoid the particular risk that setting presented to her health and safety, given her serious underlying health conditions.

²Again, “[l]ooking at the terms of the contract as a whole and giving meaning to each provision,” Jones v. ERA Brokers Consol., 6 P.3d 1129, 1132 (Utah 2000), the language of contractual phrase “leaves school due to . . . serious illness,” working together, describes what Tenant A did and therefore why paragraph 23B becomes operative for Tenant A.
choice. However, Tenant B did not leave “due to… a serious illness” under the meaning of paragraph 23B.

Contracts are to be interpreted in a way that does not lead to absurd results as would occur were the pandemic itself and its general effects alone held to make termination operative for the many landlords and tenants who have continued to meet their contractual obligations to one another. In evaluating the intents of the parties, and their allocation of risk accepted at the time of contracting, to interpret the “serious illness” provision of the lease to encompass the pandemic as generally experienced would require a departure from the reasonably discernable intent of the parties and their allocation of risk at the outset of the contract.  

In sum, the foregoing contract interpretation squares with an allocation of risk to Tenant B in the event, as here, it became a prudent choice, but not directly and specifically necessary for Tenant B personally, to vacate the apartment to help protect her own and others’ health. Tenant B is not entitled to terminate the lease under the “due to … serious illness” provision of paragraph 23B. Tenant B remains obligated to pay rent through the term of her contract, unless she “sells” it.

*Catastrophic Loss.*

Tenants claim that the loss of their father’s employment is a catastrophic loss entitling them to terminate their lease contracts, and Tenant B asserts that the loss of her own part-time employment bolsters her claim that the “catastrophic loss” provision of paragraph 23B applies to her circumstances.

Yet in this case Tenant B did not demonstrate in her termination notice to Landlord, and has not sufficiently shown since, that the loss of her father’s employment, even combined with her part-time employment, is a catastrophic loss. In Utah, terms in a non-commercial lease such as this lease, generally are given their plain meaning.

Merriam-Webster Online Dictionary defines catastrophe as follows:

1: a momentous tragic event ranging from extreme misfortune to utter overthrow or ruin
2: utter failure : FIASCO

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3 *Equine Assisted Growth & Learning Ass’n v. Carolina Cas. Ins. Co.*, 266 P.3d 733, 736-37 (Utah 2011) (“The primary purpose of contract interpretation is to ‘ascertain the intentions of the parties’ at the time of contracting”) (quoting *WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139 (Utah 2002); *see also, Glenn v. Reese*, 225 P.3d 185, 190 (Utah 2009) (preferring an interpretation that “allows each provision to have effect and does not produce absurd or harsh results”); *Freeman v. Gee*, 423 P.2d 155, 161-62 (Utah 1967) (“Whenever two interpretations of a written instrument are reasonably possible, and one construction produces a reasonable result which is in accord with the likely or clearly possible object, purpose and intent of the parties, and the other construction produces a result which is unreasonable or absurd, the latter construction should never be adopted.”) (quoting *Jones v. Park Lane for Convalescents*, 120 A.2d 535, 540 (Pa. 1956)).

4 *See, Mind & Motion Utah Invs., LLC v. Celtic Bank*, 367 P.3d 994, 1003 (Utah 2016) (“It is a basic principle of contract law that parties are generally ‘free to contract according to their desires in whatever terms the parties can agree upon.’ This includes assuming risks that third parties or external environmental circumstances will fail to conform to the parties’ expectations”) *See also, Selvig v. Blockbuster Enters., LC*, 266 P.3d 691, 697-98 (Utah 2011) (ruling out a result that the parties could not have intended, under a reading of the contract as a whole).

3a: a violent and sudden change in a feature of the earth

b: a violent usually destructive natural event (such as a supernova)

4: the final event of the dramatic action especially of a tragedy

Using any of these definitions, the loss of a parent’s employment, while serious, is not in itself a catastrophe, even if combined with loss of the tenant’s own part-time employment. Anytime, as here, one enters into a lease contract, there is an implicit understanding that circumstances will remain so that a tenant can make required lease payments. Yet, because of the uncertainties of life, there is always a risk that conditions may change and a tenant will face unanticipated difficulty meeting the obligation to pay rent. Tenants undertook that risk when they entered into their leases. Certainly they and their parents expected to be able to make their monthly lease payments. The father’s job loss, and their personal job losses and employment reductions are within the range of risk that they undertook when they decided to rent the apartment.

If losses commonly experienced are sufficient to constitute catastrophic losses under the lease, nearly every person using the BYU drafted lease forms, tenant and landlord alike, would be able to terminate their lease due to one or another of the results of the general economic devastation experienced across the world as a result of the pandemic. That would be a far more broad release than contemplated under the lease and would create significant uncertainty for all parties, not knowing whether the other party would decide to terminate their lease. As discussed earlier, such a result cannot have been intended under the standard lease form. Rather, in order for this termination provision to become operable, a loss that is both direct to the Tenant and objectively catastrophic must occur.

Tenants further claim that the sudden onset of sickness and subsequent passing of Tenants’ aunt is a catastrophic loss for which they can terminate their lease contracts. Without question the loss of any person close to us always is a terrible loss. Life is fragile and the future is uncertain for all. Here, at a time that the pandemic was turning their world upside down, Tenants’ aunt suddenly became ill and shortly thereafter died. We cannot know the depth of that loss. But in the context of this lease, that terrible loss does not fit within the term “catastrophic loss” as set forth in the lease such that her sudden illness and passing would allow Tenants to terminate their leases. Tenants did not leave due to a “catastrophic loss” under the meaning of paragraph 23B.

**Frustration of Purpose analysis**

Tenants further seek termination of their leases under the doctrine of frustration of purpose. Frustration of purpose of a contract occurs when “the purpose for which, in the contemplation of both parties, the transaction was made” is totally or nearly totally destroyed. In addition to the purpose that is frustrated necessarily being within the contemplation of both parties, that purpose must also be the principal purpose of the contract, rather than merely among the benefits of the contract. While living within walking distance of in-person, on-campus

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classes and jobs was a major benefit of their leases and was an important reason Tenants chose to enter into their leases, it cannot be said to comprise the principal purpose of the leases in “the contemplation of both parties,” that is, for both Tenants and Landlord.\(^9\) Rather, the primary purpose of the lease contracts, when viewed from the perspective of both Landlord and Tenants, was to provide BYU approved housing in which Tenants could reside. That primary purpose has not been impacted by the events arising from the virus pandemic. Frustration of purpose does not release Tenant B from her lease.

**Summary, Conclusion and Ruling**

Tenant A is released from her lease. Tenant B remains obligated to pay rent according to the terms of her lease.

Tenant A has serious health issues, including two different heart irregularities which render her physical constitution weaker than most young adults in her peer group and leave her significantly compromised should she encounter a virus like Covid-19. She also has Lyme disease, also a particularly difficult disease. Tenant A left school and returned home because she genuinely and reasonably feared for her personal health and safety if she remained in the apartment. Her notice of termination under paragraph 23B was proper and timely. She promptly left the proximity of the school and the student housing setting “due to … a serious illness” within the meaning of that paragraph. She is released from her tenancy under paragraph 23B and is not obligated for any rents after March 31, 2020. Pursuant to paragraph 23B she will forfeit her security deposit.

When the pandemic hit it became a prudent choice, but not directly and specifically necessary for Tenant B personally, to vacate the apartment to help protect her own and others’ health. However, Tenant B is not entitled to terminate the lease under the “due to … serious illness” provision of paragraph 23B because that provision does not provide for termination by reason of the general effects of the pandemic on persons not directly and personally impacted by the virus. For similar reasons, the “catastrophic loss” provision does not apply to Tenants. The doctrine of frustration of purpose is also inapplicable to these circumstances. Tenant B remains obligated to pay rent through the term of her contract unless she “sells” it according to the terms of her lease.

Dated: May 18, 2020

*Anthony W. Schofield*

Arbitrator

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\(^9\) In addition to stating helpful principles with regard to the doctrine of frustration of purpose, *Tech Ctr. 2000, LLC v. Zrii, LLC*, 363 P.3d 566, 575 (Ct. App. Utah 2015) contains analogies illustrative of the inapplicability of the doctrine to Tenants’ situation in the case at hand. The tenant in that case experienced an “unforeseen crippling blow” that threatened the tenant’s financial stability. However, the event “did not obliterate the purpose for which the transaction was made - to provide [the tenant] space to operate its business and to fulfill Landlord’s need for a tenant.” (internal punctuation and citation omitted). Here, Tenants were provided space to live in BYU approved student housing to attend school and work, a purpose Landlord was fulfilling until the pandemic and which continued to be available even after Tenants left for home. Tenant B in particular, having no heightened medical risk as compared to other students who chose to remain, could have attended school online from her apartment because Landlord continued to meet Landlord’s obligation to provide the space.