The arbitration hearing in this matter was heard May 18, 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) is a tenant in a residential unit at apartment complex. Their tenancy under his lease runs until mid-August, 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.
7. 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.

8. Tenant has a liver condition. Verification existed before the pandemic in a written letter about his diagnosis. As a child Tenant had asthma, though he has not had symptoms after about age 16. In addition, Tenant’s mother has chronic, severe, underlying health conditions.

9. Individuals with liver conditions such as Tenant’s 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.

10. Because of these designations by state and federal authorities, Tenant and Tenant’s parents reasonably perceived that these medical conditions directly and specifically put Tenant at more critical risk if he contracted the Covid-19 virus. They also had significant worry that if Tenant were to visit home from his apartment, he could bring the virus home and place his mother’s health in serious jeopardy.

11. In order to protect his health in light of his liver condition and a perception that his childhood asthma could recur and further heighten the danger from the pandemic on his personal health and safety, Tenant left the apartment immediately on March 12, 2020 and self-isolated at his family home in ______, Utah when BYU closed its campus. Tenant and Tenant’s family continue to follow heightened health protection protocols as recommended by government entities and a family friend who is a nurse serving covid-19 patients.

12. Due to Tenant’s efforts to follow heightened health protection protocols, Tenant is currently not employed.

13. Tenant did not immediately give notice to Landlord of his desire to terminate the lease because he was uncomfortable disclosing his liver condition and because his father could pay the rent for the time he would be away from the apartment.

14. Tenant’s father lost his job due to the pandemic and on March 27, 2020, Tenant’s father attempted by e-mail correspondence with Landlord to terminate Tenant’s lease due to loss of his financial means to pay the rent. Landlord responded March 30, 2020 offering a payment plan but not accepting Tenant’s father’s attempt to terminate the lease.
15. On March 30, 2020, Tenant’s father again sought to terminate the lease by e-mail correspondence with Landlord, this time citing the following language from paragraph 23B of the lease: “If the student leaves school due to a verified unforeseeable and unexpected catastrophic loss or serious illness.” In that e-mail, Tenant’s father provided details as to his assertion that his job loss was related to the catastrophe of the pandemic, but Tenant’s father continued to withhold disclosure of Tenant’s liver condition.

16. Landlord did not accept this second request to terminate the contract. Landlord replied by e-mail on March 30, 2020: “Unfortunately this situation does not apply to that clause. [Tenant’s apartment complex] is still a safe place to live. While we are not able to release you from your contract, we can grant you a payment extension that goes beyond the end of the month. We look forward to your response.”

17. In e-mails in March and in the demand to arbitrate form, Tenant and Tenant’s father also asserted that Tenant’s mother’s underlying health condition put her at increased risk during the pandemic and that protecting his mother’s health was a reason Tenant returned home, so he would not be going back and forth between what he perceived was an unsafe student housing environment and their home where his mother was.

18. After prior efforts to terminate the lease failed, Tenant included disclosure of his liver condition in the demand to arbitrate form.

19. Tenant’s departure from the student housing setting was prompt and in good faith primarily to protect his health in light of his liver condition that puts him at higher risk during the pandemic, and not as pretext to avoid his obligation to pay rent.

20. Tenant paid rent for March but has not paid rent for April and May.

Legal Analysis

Tenant asserts that he should be released from his lease because paragraph 23B of the contract allows a student tenant to terminate the lease due to serious illness. He asserts that his decision to leave was based on his high-risk status and therefore on his particular need to avoid the risk of contracting Covid-19 in the environment of student housing where social distancing in the apartment was not possible and where he had no control over his roommates’ compliance with social distancing guidelines in their own lives. He also asserts that his father’s loss of his employment constitutes a catastrophic loss.

Landlord asserts that paragraph 23B does not apply because Tenant did not inform Landlord of Tenant’s liver condition until he requested arbitration, that he does not have moderate to severe asthma and there is no evidence his condition puts him at higher risk, and that his father’s job loss does not constitute a catastrophic loss under the meaning of the language of the contract.
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 Tenant could not be at school, in the sense that he could not be on campus attending classes, the library or other campus activities, but he had not entirely left the school setting while he remained in student housing. When BYU closed, Tenant immediately decided that residing in such close contact with many other students was too risky in light of his liver condition and a perceived threat of recurrence of childhood asthma 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 demonstrate that he is leaving due to a direct, personal effect on that tenant from the serious illness.

Tenant has a liver condition that is listed in government documents warning individuals at higher risk to sustain the highest level of health-protective actions even as other general restrictions are lifted. When the pandemic became a pronounced problem, he decided not to risk

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 “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 his health and safety, given his liver condition.
his health and left school, namely, the student housing setting. His father later attempted to terminate the contract without disclosing the liver condition. Tenant asserts today, given his liver conditions, he would be at grave risk if he contracts the virus and has been diligent in self-isolating upon his return home. Tenant left the apartment and returned home because he genuinely and reasonably feared for his personal health and safety if he remained in the apartment. His termination under paragraph 23B was proper and timely. He promptly left the proximity of the school and the student housing setting “due to … a serious illness” within the meaning of that paragraph. He is released from his tenancy under paragraph 23B.

Tenant also reasonably perceived that to quarantine at home would be more protective of his mother’s health than periodically coming into contact with her while continuing to live in student housing. However, Tenant’s effort to protect his mother’s health in this way does not meet the meaning of leaving school “due to… a serious illness” under paragraph 23B.

Tenant reasonably perceived that his childhood asthma might recur and compound his heightened risk of serious health consequences during the pandemic. However, it is only moderate to severe asthma that results in high-risk status as established by the Utah and CDC, not the possibility of a recurrence of childhood asthma. While it may have been prudent for Tenant to abide by guidelines for high-risk individuals were past childhood asthma his only risk factor, paragraph 23B does not provide a release to tenants simply for making reasonable, prudent choices during the pandemic. Under the lease, Landlord assumed the risk that Tenant might be personally, directly impacted by a serious illness and be released from his obligation. Tenants bear the risk, and therefore retain the obligation to pay rent, when they leave school due to prudent decision making that does not rise to the level of the plain language of the contract and legal principles of contract interpretation.3

Catastrophic Loss.

Tenant claims that the loss of his father’s employment is a catastrophic loss entitling him to terminate the lease contract. Because Tenant’s termination is appropriate under the “serious

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2 Again, “[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 the contractual phrase “leaves school due to … serious illness,” describes what Tenant did and therefore why paragraph 23B becomes operative.

3 Contracts are to be interpreted in a way that does not lead to absurd results as those that would occur were the pandemic and its general effects sufficient to make termination operative for the many landlords and tenants who have continued to meet their contractual obligations to one another. See, e.g., 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)); 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).
illness” leg of paragraph 23B, it is not necessary to reach Tenant’s request to terminate under the “catastrophic loss” leg of the paragraph.

Summary, Conclusion and Ruling

Tenant is released from his lease. He has an underlying liver condition that is included as a particular risk factor in state and federal guidance concerning persons at particularly high risk during the pandemic. Tenant left school and returned home specifically in response to his personal higher-risk status. His notice, provided by his father, of termination under paragraph 23B was proper and timely. He immediately left the student housing setting “due to … a serious illness” within the meaning of that paragraph. He is released from his tenancy under paragraph 23B and is not obligated for any rents due after March 31, 2020. Pursuant to paragraph 23B he will forfeit his security deposit.

Dated: May 22, 2020

Anthony W. Schofield
Arbitrator