The arbitration hearing in this matter was heard June 2, 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. His tenancy under his lease runs until August 15, 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 and Tenant received word that his job at the BYU testing center would end due to the campus closure.
7. On March 14, 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. Provo Mayor Michelle Kaufusi also encouraged landlords to release students from their housing contracts.1 Some landlords released student tenants from their housing contracts.

9. On March 18, 2020, BYU’s campus newspaper, The Daily Universe, reported on the response of a BYU approved housing apartment complex to having received word that one of its residents had tested positive for Covid-19.2 By March 24, several other media outlets had reported on landlord responses to reports of possible Covid-19 exposure in their complexes.3 On March 23, BYU announced its first confirmed case of Covid-19 and media outlets reported on the off-campus housing manager’s response to learning of the case.4 By March 27, BYU had added a self-reporting tool to its website for individuals to self-report when they had tested positive or were awaiting test results for Covid-19.5

10. Section 9 of the lease reads as follows:

DISPUTE SETTLEMENT: When a landlord and a BYU student fail to settle any controversy with respect to the rental facilities or to their rental Agreement(s) after making a good faith effort on their own, all such controversies shall be submitted to the CCR for binding mediation/arbitration. Both parties agree to make a good faith effort to settle such controversy through mediation and to be governed by the Mediation Rules of the CCR unless the CCR declines to mediate the controversy. If mediation fails to resolve the problem, either party may request arbitration by the CCR. If either party requests arbitration, both parties agree to submit to the jurisdiction of the CCR and be bound by its decision as rendered in accordance with its rules and regulations. The parties agree that the CCR arbitrators have sole and exclusive right to determine all questions of law and fact and may grant any remedy or relief that the arbitrators deem just and equitable, including

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1 One media outlet that covered the mayor’s statement reported on it here: https://www.kslnewsradio.com/1921637/byu-student-complex-reports-a-resident-tested-positive-for-covid-19/.
2 E.g., https://universe.byu.edu/2020/03/18/liberty-on-freedom-resident-tests-positive-for-covid-19/.
3 https://universe.byu.edu/2020/03/18/liberty-on-freedom-resident-tests-positive-for-covid-19/.
specific performance. Any BYU student who fails to comply with an arbitrator’s decision will have a hold placed on his or her university records and a stop and discontinuance on registration. Landlords who fail to comply with such decision(s) will be in material breach of their BYU contract for their facilities which then will be terminated. If civil court action is pursued to enforce the terms of this Agreement, mediation agreement, or the arbitration award, the non-prevailing party agrees to pay all costs in connection therewith, including a reasonable attorney’s fee. Other non-BYU students may have alternative dispute procedures provided by their own institutions. Any landlord or facility that does not comply with any decision or mediation will not be eligible for a contract to provide Contracted Housing. Eviction: If a BYU student requests mediation after an eviction notice has been served, the CCR must schedule mediation within 72 hours or three business days of being notified of the eviction notice.

11. Section 23 of the lease reads, in relevant part, as follows:

**TERMINATION BY STUDENT OR AUTOMATIC TERMINATION:** The Agreement may be automatically terminated, or terminated by the student, prior to its expiration, with all rental charges prorated through the last day of tenancy under the following circumstances and conditions:
A. Death of the student.
B. If the student leaves school due to a verified unforeseeable and unexpected catastrophic loss or serious illness. In such instances, termination of the Agreement is in effect after the landlord receives acceptable verification. Student shall forfeit security deposit and legal deductions…

12. Tenant’s uncle (“Uncle”) is a physician. Tenant had lunch with Uncle on March 14, sharing food from the same plates.

13. Tenant learned March 19 that Uncle was exhibiting symptoms of Covid-19. Uncle was unable to access testing for Covid-19 at that time, but Uncle and Tenant reasonably believed that Uncle likely had contracted Covid-19. Tenant did not notify Landlord on March 19 of his possible exposure to Covid-19.

14. In mid-March, World Health Organization guidelines for individuals who had likely been exposed to Covid-19 included self-quarantine for 14 days in a room by themselves with a dedicated bathroom.

15. Tenant reasonably perceived that if he remained in the student housing setting he could not self-quarantine according to the guidelines for individuals likely exposed to Covid-19, so he moved everything out of his apartment and self-quarantined in his family’s home in [redacted], Utah beginning March 20, 2020.

16. On March 24, 2020, Tenant e-mailed Landlord in an attempt to terminate the lease under the serious illness and catastrophic loss provisions of paragraph 23B of the lease, which he quoted in the e-mail. In that e-mail, Tenant asserted temporary loss of employment and loss of his “health safety” as his personal circumstances relevant to paragraph 23B.
17. On March 31, 2020, Landlord replied by e-mail via a leasing agent informing Tenant that Landlord did not accept this request to terminate the contract.

18. The only follow-up in March by Landlord for further information as to the nature of Tenant’s asserted qualification for termination under 23B was in that same March 31, 2020 e-mail and also general: “Please be sure to fill out any surveys that the property sends out as that will help us collect accurate information on living accommodations and the employment status of our residents.”

19. Tenant did not provide follow-up information in March as to the nature of Tenant’s asserted qualification for termination under 23B.

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 or catastrophic loss. He asserts that his decision to leave was based on his likely exposure to Covid-19 and therefore his particular need to avoid the risk of spreading Covid-19 by going into self-quarantine, which was not possible in the environment of his apartment in student housing. Tenant asserts that loss of his part-time job on BYU campus releases him under the catastrophic loss provision of paragraph 23B. Tenant asserts that the change in his status from an in-person BYU student to an online-classes BYU student is also relevant. Tenant asserts that Landlord should follow the example of other landlords in responding to BYU and Provo Mayor Kaufusi by choosing to release students from their leases due to the pandemic generally. Tenant finally asserts that the doctrine of frustration of purpose releases him from his obligations under the lease because one of the purposes of the lease, to live near campus for in-person classes, has been frustrated and because the value of the lease to him has been destroyed by the campus closure.

Landlord acknowledges that Tenant’s choice to self-quarantine once he learned of his likely exposure to Covid-19 was socially responsible but asserts that paragraph 23B does not apply because Tenant’s mention of loss of “health safety” in his reference to termination under paragraph 23B did not sufficiently inform Landlord of Tenant’s likely exposure to Covid-19 until arbitration, too late for Landlord meaningfully to respond. Landlord asserts that temporary unemployment is not objectively catastrophic and does not meet the paragraph 23B meaning of “catastrophic loss.” Landlord points out that in the lease, the phrase “student status” refers to being a student at an eligible institution, which Tenant still was when his BYU classes changed from in-person to online. Landlord also asserts that the business decisions of other landlords are not dispositive of what Landlord should do, and that the doctrine of frustration of purpose does not apply because Landlord’s performance remains of value, in accordance with Utah case law regarding the doctrine of frustration of purpose. Landlord is correct as to all points, some of which are discussed further herein. Tenant did not properly terminate the lease.

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6 Following the WHO guidelines in the apartment was not possible due to the close quarters, shared bedroom and shared bathroom.
This ruling is made solely on the merits of this case. However, many of the issues have been addressed at length in rulings recently published by the Center for Peace and Conflict Resolution. For brevity and for clarity as to the issue most centrally dispositive of this matter, this ruling refers to prior published rulings to flesh out the legal analysis on some of the issues.

Leaves School.

As discussed most recently in ruling #11, paragraph 23B allows a tenant to terminate the lease “[i]f the student leaves school due to a verified unforeseeable and unexpected . . . serious illness.” In this matter, when Tenant learned he had likely been exposed to Covid-19, he immediately realized that compliance with WHO self-quarantine guidelines was not possible in his apartment and left school, namely, the student housing setting.

Serious Illness.

Ruling #11 also sets forth that in order to meet the paragraph 23B meaning of leaving school due to a serious illness, a tenant seeking termination must demonstrate that he is leaving due to a direct, personal effect on that tenant from the serious illness. When Tenant learned Uncle likely was ill with Covid-19 and that Tenant therefore likely had been exposed to Covid-19, Tenant left the apartment and returned home because he genuinely and reasonably perceived that he could not appropriately self-quarantine in the apartment. He promptly left the student housing setting “due to . . . a serious illness” within the meaning of that paragraph.

Frustration of Purpose.

In arguing the applicability of the doctrine of frustration of purpose, Tenant asserts that rather than merely among the benefits of the lease, living where he could readily access in-person, on-campus BYU classes was the central purpose of the lease, in part because BYU requires single undergraduate students who are attending in-person classes to reside in BYU approved housing. Similar arguments were made in the matter addressed by ruling #9. As was clear in light of the facts in that matter as well, the facts of this matter demonstrate that the primary purpose of the lease contract, when viewed from the perspective of both Landlord and Tenant, was to provide BYU approved housing in which Tenant could reside. That primary purpose has not been destroyed by the events arising from the virus pandemic. The law rules out discharge of one party’s obligations for frustration of purpose when performance of the other party’s obligations is still of value. The value of Landlord’s provision of BYU approved housing has not been destroyed; indeed, Landlord continues to meet its obligation to provide

7 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. Tech Ctr. 2000, LLC v. Zrii, LLC, 363 P.3d 566, 575 (Ct. App. Utah 2015) (emphasis added) (quoting Castagno v. Church, 552 P.2d 1282, 1283 (Utah 1976)).

8 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. Tech Ctr. 2000, LLC v. Zrii, LLC, 363 P.3d 566, 575 (Ct. App. Utah 2015) (quoting Restatement 2d of Contracts § 265).

9 Bitzes v. Sunset Oaks, 649 P.2d 66, 69-70 (Utah 1982) (“frustration is no defense if . . . counterperformance remains valuable”) (internal citations omitted). In other words, if Landlord’s performance remains valuable, the purpose of the contract is not frustrated. The apartment is still BYU approved housing that has been and still is available for occupancy by Tenant.
BYU approved housing to Tenant and to a significant percentage of its tenants who continue to occupy the apartment complex. Frustration of purpose does not release Tenant from his lease.

**Verified and Acceptable Verification.**

To have properly terminated the lease Tenant must have done his part to meet the verification requirement of paragraph 23B. It was noted in ruling #11 that the appropriate meaning of the phrase “acceptable verification” is not to be unilaterally disregarded by landlords. The same goes for tenants. In this matter I find that Tenant did not meet the verification requirement of paragraph 23B.

Beyond use of the phrase “health safety” in his March 24 e-mail referencing the “serious illness” phrase in paragraph 23B, Tenant did not provide details as to his own experience of the serious illness until he provided materials for the June 2, 2020 arbitration hearing. A careful review of the evidence makes clear that he never addressed his potential exposure to Covid-19 prior to arbitration.

Tenant’s situation is distinct from the situation of tenants with underlying medical conditions that put them at higher risk during the pandemic. As noted in ruling #11, detailed verification in the form of a tenant’s personal health information about an underlying medical condition that heightens the tenant’s risk status is not required with the initial notice of termination if a tenant adequately puts the landlord on notice of a serious illness and the landlord fails to follow up. If the landlord views the verification inadequate, the principle of good faith and fair dealing shifts the burden to the landlord to make further inquiry. Otherwise the landlord risks the possibility that the serious illness did indeed meet the paragraph 23B meaning that justifies termination of the lease and that the landlord’s own inaction is the only reason verification was not confirmed pursuant to the initial notice.

This matter is a case in point of the opposite risk: the risk borne by a tenant who fails to disclose in good faith details to which the landlord is entitled under the circumstances. When the reason for leaving is likely exposure to Covid-19 and a perception of a resultant need to leave the traditional student housing setting for the protection of remaining tenants, termination is not proper when that information is withheld from the landlord.

Here, Tenant provided notice of serious illness and it was eventually confirmed that Tenant’s situation met the paragraph 23B meaning of serious illness. However the need to self-quarantine because of possible exposure to Covid-19 and resultant danger to roommates is unlike the underlying medical conditions that, due to the private nature of personal health information, landlords cannot in good faith require tenants to disclose in detail along with the initial paragraph 23B notice. If good faith requires anything during this pandemic, it requires prompt disclosure to

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10 The principle that contracts are not to be interpreted in a way that would lead to absurd results, addressed in rulings #8 and #11, may also be helpful to individuals seeking to understand reasons underlying the counterperformance principle referenced in Bitzes. As noted in those rulings, if the pandemic and its general effects alone were to make the doctrine of frustration of purpose operative for the many landlords and tenants who have continued to meet their contractual obligations to one another, there would be chaos and uncertainty in the off campus housing market.
the landlord that the reason a tenant is leaving to help protect remaining tenants from probable exposure to Covid-19.\textsuperscript{11}

Even taking into account the very serious nature of medical privacy, likely exposure to the virus responsible for this pandemic is information that cannot in good faith be withheld, especially in context of the good faith requirement that medical privacy places upon landlords to follow up on notification of serious illness.

Good faith cuts both ways. A landlord’s need to respond to potential presence of the virus on its premises overrides considerations of medical privacy that would otherwise shift the burden of verification to the landlord when a tenant invokes the serious illness provision of paragraph 23B. No tenant under the BYU standard lease form should expect to be able to terminate under paragraph 23B due to the need for tenant to leave in the safety interest of others of landlord’s residents if the tenant did not give the landlord specific notice and detailed verification of that fact at the time the tenant left.

Rather than sharing this important information, Tenant did not inform Landlord when he learned on March 19 of his likely exposure to Covid-19, and Tenant’s March 24 email said that he was terminating because of Covid-19 (as it was impacting the area and world generally) and his “health safety.” While it is possible to infer that Tenant meant by the phrase “health safety” to refer to his likely exposure to Covid-19 and therefore to the safety of his roommates and others in the student housing setting, this is inadequate to give Landlord good faith notice of the direct, personal impact of the serious illness in Tenant’s life. It falls short of meeting the paragraph 23B verification requirement.

Section 9 of the contract expressly requires good faith in parties’ efforts to resolve disputes, a contractual provision that aligns with an important principle of Utah contract law. “Under Utah law, an implied covenant of good faith and fair dealing generally inheres in all contractual relationships.”\textsuperscript{12} Even broad termination rights cannot be validly exercised contrary to the principle of good faith.\textsuperscript{13}

By clarifying the requirements of good faith on both landlords and tenants, this ruling does not accuse either of acting in bad faith. Rather, this ruling seeks to help identify edges of the lane within which parties to the BYU lease form must operate in relation to one another, under both

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\textsuperscript{11} I acknowledge that in March, 2020, the flow of information about the pandemic was heavy and confusing. However, even at that point in the pandemic, media coverage of responses by student housing landlords to word of Covid-19 exposure was accompanying all or nearly all stories about possible exposure in BYU approved student housing. BYU’s addition of a self-reporting form to its website also signaled the importance of communicating about possible exposure within the community. Even in the rapid decision making that was occurring during March, 2020, it was reasonable to expect Tenant to understand Landlord’s need to know the nature of his departure if Landlord was to protect other tenants from exposure to Covid-19 from him.


\textsuperscript{13} Resource Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1037 (Utah 1985). See also, A.I. Transp. v. Imperial Premium Fin., 862 F. Supp. 345, 348 n. 5, 6 (D. Utah 1994) (comparing Utah and 10th Circuit views of good faith limits on contract enforcement and asserting that express, unlimited contract termination power that gives the other party no expectation of any protection from that power may not be overridden by the principle of good faith). The lease at issue in this matter does not expressly allocate to either party power so broad as to override good faith.
the Section 9 good faith requirement and the implied covenant of good faith and fair dealing. The lease does not support any acts nor failures to act that breach good faith.

Because the true nature of the direct, personal impact of the serious illness should have been, but was not, provided to Landlord until arbitration, and because good faith both guides and constrains the applicability of all provisions of the lease, it is clear that Tenant did not meet the level of detail necessary to notify Landlord of his termination under paragraph 23B. Thus, the verification requirement of paragraph 23B was not met and Tenant did not terminate his lease.

**Dispute Resolution.**

In finding Tenant responsible to meet his obligations under the lease, I have noted the dispositive applicability of both the express good faith provision in the language of the lease and the implied covenant of good faith and fair dealing that governs virtually all contractual relationships in this state.

While it is in favor of Landlord, this ruling does not release Landlord from its obligation to respond fairly, in good faith, to the news that Tenant will need to pay all amounts due according to the terms of the lease. It is objectively no more difficult for the parties to this lease, Landlord and Tenant, to discern what constitutes good faith as to timing of meeting payment obligations than it was for this arbitrator to discern when Landlord was entitled to details as to Tenant’s reason for leaving in March.

I urge both parties to give thoughtful attention and careful diligence to their respective obligations to act in good faith as they wrap up the resolution of this dispute by making appropriate arrangements for payment.

**Summary, Conclusion and Ruling**

Tenant remains obligated to perform under his lease. Tenant left school and returned home specifically in response to his personal need for self-quarantine space that he reasonably perceived not to be available at the apartment complex. However, Landlord did not receive “acceptable verification” under the objective meaning of that phrase in the lease. Nor did Tenant’s loss meet the meaning of the phrase “catastrophic loss” in the lease. The doctrine of frustration of purpose is not applicable to Tenant’s circumstances.

As to arranging for Tenant to meet the obligation to pay rent, an obligation Tenant becomes reasonably aware of only as of today’s date, both Tenant and Landlord remain obligated to the express provision for good faith in Section 9 of the lease.

Dated: June 8, 2020

*Anthony W. Schofield*
Arbitrator