The arbitration hearing in this matter was heard July 16, 2020, by Zoom video. Having carefully reviewed all the evidence, amicus briefs, and the briefs of the parties, I now issue this ruling granting Tenant’s request to terminate her lease.

Statement of Facts

1. Tenant purchased another student’s contract for a residential unit with Landlord in February, 2020 and paid a $700 security deposit. Tenant’s occupancy and obligation to pay $355 rent per month was to begin April 25 and run until August 15, 2020.

2. (collectively, Landlord) operate BYU approved housing.

3. All single BYU students are required to reside in BYU approved housing, to live at home, or to obtain a waiver of this requirement. Meeting this requirement is one of the benefits of living in BYU approved housing.

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

5. 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.

6. 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.
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.

On March 22, 2020, the Mayor of the City and County of Honolulu, Hawaii where Tenant resides and was residing at the time, issued Emergency Order No. 2020-02 (hereinafter, “County Order”) which required all people living in the City and County of Honolulu to stay in their residence and prohibited all non-essential travel. This order provided, “Violation of any of the Orders is punishable as a misdemeanor, with fines up to $5,000, up to a year in jail, or both.”

The County Order included among others the following exclusive descriptions of essential activities, none of which could in good faith be interpreted to include a choice to travel to Provo when Tenant’s schooling could be accomplished without doing so:

“to engage in activities or perform tasks essential to their health or safety…”
“to obtain necessary services or supplies…”
“to engage in outdoor activity in locations as allowed by law…”
“to perform work providing essential products and services at an Essential Business…”
“to care for a family member…”
“to work for or obtain services at any Healthcare Operations…”
“performing Essential Government Functions…”
“facilitating distance learning, performing critical research, or performing essential functions [of an educational institution]…”

“Essential Travel [which] includes… travel related to the provision of or access to Essential Activities …. Travel to care for… vulnerable persons…. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services… Travel to return to a place of residence from outside the jurisdiction… Travel required by law enforcement or court order…. Travel required for non-residents to return to their place of residence outside the City.”

These exceptions remained essentially the same, as to a good-faith and reasonable understanding that none applied to Tenant, through two amended and restated orders that, combined, extended the travel restrictions through May 31, 2020. See, Office of the Mayor, City and County of Honolulu Emergency Order No. 2020-10, Second Amended and
11. The County Order was issued pursuant to Hawaii Revised Statutes §127A-25, which provides in part,

For the purpose of carrying out any provision of this chapter [Chapter 127A - Emergency Management], the governor may adopt rules for the State and the mayor may adopt rules for the county which may, if so stated in the rules, have the force and effect of law… and may be made effective upon the promulgation… by means calculated to bring its contents to the attention of the general public….

12. The County Order explicitly asserted that it was in accordance with state orders and that the intent of the order was “to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the maximum extent possible.”

13. On March 25, 2020, the Governor of the State of Hawaii issued a similar stay-at-home order (hereinafter, “State Stay-Home Order”). The State Stay-Home Order did not apply to travel to leave the state. The State Stay-Home Order was issued pursuant to the same state statute as the County Order and provided, as to county orders,

In the event of any inconsistency, conflict or ambiguity between this Proclamation and any county emergency order, rule, directive or proclamation, the relevant documents shall be read to allow for maximum flexibility so that essential businesses and operations continue unimpeded.

14. On April 25, 2020, the Governor of the State of Hawaii issued an order, titled Sixth Supplementary Proclamation Amending and Restating Prior Proclamations and Executive Orders Related to the Covid-19 Emergency (hereinafter, “Amending Order”). The April 25 Amending Order amended and restated prior orders, including the March 25 State Stay-Home Order. Among other amendments, the Amending Order did not include travel to an airport to leave the state among activities to which the orders did not apply. The Amending Order also provided, as to county orders,

In the event of any inconsistency, conflict or ambiguity between this Proclamation and any county emergency order, rule, directive or proclamation, the relevant documents shall be read to allow for maximum flexibility so that essential businesses and operations continue unimpeded.

Restated Stay At Home / Work From Home Order. Available at https://www.honolulu.gov/rep/site/may/may_docs/Emergency_Order_No._2020-10.pdf. The definition of Essential Travel was amended to include Designated Businesses and Operations, and certain real estate activities, presumably within Honolulu, were permitted under an exhibit to the order that set forth Designated Businesses and Operations.

2 The Third Supplementary Proclamation was fourth in a series of pandemic-related orders issued by the governor of the State of Hawaii. The first order was issued March 4 and declared a state of emergency, invoking certain statutes related to emergency management and suspending others.

3 The Third Supplementary Proclamation (the State Stay-Home Order) read, in relevant part, “This order shall not apply to the following activities outside a person’s home or place of residence: … 6. Travel from a person’s home or place of residence to the nearest airport or other facility for departure from the State…”

4 The “Permitted Activities Outside the Home or Place of Residence” section of the Amended Order was identical to the same section of the State Stay-Home Order except for the removal of the allowance for travel to leave the state and the renumbering made necessary by removal of that allowance.
documents shall be read to allow a county maximum flexibility to exercise its respective emergency management authority.

The Amending Order included educational institutions among “essential business or operations,” but allowed for travel to essential businesses and operations only “to the extent that such businesses or operations cannot be conducted through remote technology from homes or places of residence.” The Amending Order echoed prior provisions for criminal penalties for violation of the emergency orders.

15. By the time Tenant was to take occupancy of the apartment, Honolulu Police Department officers had issued over 7,000 warnings and over 3,000 citations and made over 100 arrests for violating emergency rules and orders.5

16. Tenant’s plan had been to attend BYU beginning with the spring term which was to commence on April 28, 2020. Her purpose in acquiring the rental contract from Landlord was to have BYU-approved housing in which to reside when she arrived in Provo, Utah, to attend BYU.

17. Tenant’s purposes in renting from Landlord also included living near to BYU campus, obtaining various benefits of BYU approved housing, and enjoying living conditions provided by Landlord such as floor space and amenities inside and outside the apartment.

18. Landlord’s purposes in renting to Tenant included providing housing with benefits, conditions and amenities such as those listed among Tenant’s purposes, in return for specified payments and actions such as adherence to BYU residential living standards and other actions.

19. The central purpose of the contract in the contemplation of both parties, as evidenced in the language of the contract, was to provide BYU-approved housing in which Tenant could reside for the period of occupancy provided for in the contract.

20. On March 24, 2020, BYU announced that there would be no in-person instruction for spring term. On April 14, 2020, BYU extended the announced online-only instruction to summer term as well.

21. BYU’s official announcements of online-only instruction for spring and summer terms removed any possibility for Tenant to claim that a need to travel to school for in-person classes was “essential travel” such that that she might be exempt from the stay-at-home orders.

22. Landlord argued that by signing the lease Tenant effectively became a Utah resident and thus, under the City Order, as a Honolulu non-resident, she could “return” to Utah. This is not correct. Tenant is a Hawaii and Honolulu resident.

23. Given that no in-person instruction at BYU would take place either spring or summer terms, and that Tenant and her parents knew this prior to the April 28 start date, by the day Tenant was supposed to begin her tenancy, Tenant and her family appropriately and in good faith believed that Tenant was not legally able to travel to Provo to occupy the apartment.

24. Tenant in good faith obeyed the letter and intent of the government orders and refrained from travel. Therefore it was not legally possible for Landlord ever to make the apartment available to Tenant, and Tenant was unable ever to occupy the apartment.

Legal Analysis

Paragraph 23B analysis not necessary

Tenant initially attempted to terminate her lease with Landlord under the provisions of paragraph 23B. That paragraph allows a student tenant to terminate a lease if the “student leaves school due to a verified unforeseeable and unexpected catastrophic loss or serious illness.” Tenant never arrived in Provo to attend school, and she is away from Provo because of actions taken by the governments of her home state and city. While it may be argued that the provision that the student “leave” school still would apply in this case because Tenant is not in Provo because of the virus, I am unprepared to conclude that Tenant left school because of a serious illness or catastrophic loss. Without belaboring these points, it is clear that this case is properly resolved under the doctrine of frustration of purpose, which is most appropriate to the facts and circumstances of this case.

Frustration of purpose - overview

As explained by the Utah Court of Appeals, the doctrine of frustration of purpose applies when, “after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.”7 If such an event occurs, the party is discharged from her duty to perform further under the contract.

Zrii makes clear that the application of this doctrine “depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was made.”8 In describing this doctrine further, the court said that while frustration of purpose is

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6 See, Office of the Mayor City and County of Honolulu, Emergency Order No. 2020-02 (herein, the “City Order”) Section II. H. defining Essential Travel” to include “Travel required for non-residents to return to their place of residence outside the City.” Available at https://www.honolulu.gov/rep/site/may/may_docs/Emergency_Order_No._2020-02ProdLinks.pdf.


8 Id.
related to whether performance of the contract is impossible or impracticable, frustration of purpose applies when “performance is pointless.”

_Frustration of purpose - principal purpose of the contract_

As Landlord pointed out at the arbitration hearing, frustration of purpose does not apply every time “circumstances … fail to conform to the parties’ expectations.” To determine applicability of this doctrine, the first question which must be answered is: What purpose was the basis of the contract? What did the parties contract to accomplish? The simple answer to this first question is that the Landlord agreed to provide, and the Tenant agreed to rent, BYU approved space for the Tenant to live. The central purpose of Tenant’s lease is for Tenant to be able to live in BYU approved housing, the purpose that can “be fairly identified in the terms of the contract” and the purpose “as both parties understand.” That purpose has been frustrated.

_Frustration of purpose - substantially frustrated_

The second question follows: How substantially was the principal purpose of the contract frustrated? In this case the Landlord could not overcome the geographic and legal separation of the apartment from the Tenant in order to perform on Landlord’s promise to make the apartment available for Tenant to live in. Tenant has not been able realize that purpose because she was unable legally to travel from her home state. She never was able occupy the apartment. The principal purpose of the lease and the value of its performance were destroyed by the direct, specific effect of the order of the Mayor of the City and County of Honolulu.

_Frustration of purpose - not reasonably foreseen or controlled_

A third element of frustration of purpose must be addressed in this case. Frustration of purpose applies only when the supervening event, in this case the legal impact on Tenant of the Hawaii government stay at home orders, was unforeseeable by Tenant, the person seeking to show the contract is frustrated. Without dispute, when viewed from the perspective of Tenant, because she is prevented by government order from leaving Hawaii, this closure was unforeseen by Tenant and also by Landlord and it was completely out of and remains out of her control.

This element is necessary to the doctrine’s just application in the face of reliance on the contract by the other party. Landlord pointed out in briefing and in the arbitration hearing that Landlord relied on this contract to make the decision to give up the contract of the person who “sold” the contract to Tenant. Had Tenant reasonably foreseen, at the time she signed the contract, the risk that government orders would prevent her from legally occupying the apartment and thus would frustrate the purpose of the contract, Tenant would be required to bear

11 Bitzes v. Sunset Oaks, Inc., 649 P.2d 66, 69 (Utah 1982) (“First, the purpose that is frustrated must have been a principal purpose of that party in making the contract….”) (quoting Restatement 2d of Contracts § 265).
12 Bitzes, 649 P.2d at 69.
14 Id. ("Second, the frustration must be substantial.") (quoting Restatement 2d of Contracts § 265) and (“The courts have required a promissor seeking to excuse himself from performance of his obligations to prove… that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if… counterperformance remains valuable.”) (quoting Castagno v. Church, P.2d 1282, 1284 (Utah 1976) (internal citations omitted)).
15 Id. ("[F]rustration is no defense if… it was foreseeable or controllable by the promissor….") (quoting Castagno v. Church, P.2d 1282, 1284 (Utah 1976) (internal citations omitted)).
that risk. Here, however, this element of frustration of purpose is met. “[T]he nonoccurrence of the frustrating event [was] a basic assumption on which the contract was made,”¹⁶ and the facts of Tenant’s inability to get to Provo to occupy the apartment, and therefore Landlord’s inability to make it available to her clearly are due to events outside of Tenant’s ability to reasonably foresee or control.

Clearly this is not a case where Tenant is attempting to avoid her lease obligations because she simply decided to go another direction (such as the case where a Tenant decides she would prefer to reside in a different complex with a friend). Rather, by governmental action in her home state she was legally prevented from coming to Provo to attend school. In sum, Tenant’s “principal purpose is substantially frustrated without [her] fault”¹⁷ and the common law doctrine of frustration of purpose squarely applies to her situation. Frustration of purpose is grounds, in this specific case, for Tenant to be discharged from her contractual obligations.

Landlord argues that Tenant was not legally prevented from taking occupancy of the apartment because (1) the State Stay-Home Order allowed Tenant to travel to Utah even during the stay-at-home mandates, (2) the State Stay-Home Order legally trumped the County Order, (3) the County Order was inconsistent with the State Stay-Home Order, and (4) the orders may have been unconstitutional. These arguments ask too much of Tenant. To uphold Landlord’s position I would have to conclude Tenant knew or should have known Landlord’s interpretations set forth above were correct and valid. That is simply a leap too far.

Further, the more likely outcome of a legal challenge to the Honolulu order and extensions thereof would be a finding that, by its express statement, Honolulu residents were indeed legally prevented from all non-essential travel. The County Order was made pursuant to state statutes and in accordance with state orders. A fair reading of the County Order together with the State Stay-Home Order is that for people outside of Honolulu, travel to airports to leave the state was legal for any reason, but for people in Honolulu, travel was not legal unless the travel met the specified definitions of essential activities. Similarly, amendments to the County Order or the State Stay-Home Order’s provision as to inconsistency with county orders might arguably be read to provide for the unimpeded operation of Landlord’s business.

While it is fair to read the State Stay-Home Order as allowing non-essential travel until it was amended April 25 to apply to such travel, it is also fair to read the Honolulu order as both aligned with the state order, as it asserts, and more specific in its restrictions on Honolulu residents as opposed to other residents of the state.

Further, the Amending Order amended the State Stay-Home Order to eliminate both grounds upon which Tenant might have asserted that it was legal for her to travel to Provo, so courts would be more likely to find that Tenant was legally prevented from travel from Hawaii to Provo to occupy the apartment. Tenant had no reasonable basis upon which to assume that the

¹⁶ Id. (“Third, the nonoccurrence of the frustrating event must have been a basic assumption on which the contract was made.”) (quoting Restatement 2d of Contracts § 265).

March 25 state order would protect Tenant from criminal penalties for a violation of the County Order.\textsuperscript{18}

It is by no means clear that breadth in the language of the state order would prohibit the City of Honolulu from executing criminal penalties on violators of its the specific provisions of its own municipal emergency orders. To the contrary, both the state statute and the Amending Order may be fairly read to provide for the County Order to prevail. Similarly, amendments to the County order also lacked clarity as to their applicability to the contract between Landlord and Tenant, and Tenant was not required, even in light of those amendments, to undertake the risk of criminal penalties in order to attempt to meet the contract terms.\textsuperscript{19}

As to Landlord’s questioning, during the arbitration hearing, of the constitutionality of the orders, many questions specific to this epidemic remain novel and undecided.\textsuperscript{20}

\textbf{Frustration of purpose - counterperformance no longer of value}

Finally, it is important to distinguish this case from prior rulings in which the “counterperformance remain[ed] valuable,”\textsuperscript{21} and thus frustration of purpose did not apply. As has been addressed more extensively in prior rulings in this series of pandemic-related arbitrations, in order for the legal doctrine of frustration of performance to apply, the purpose that is frustrated must be the principal purpose of the contract “in the contemplation of both

\textsuperscript{18} The definition of Essential Travel was amended to include Designated Businesses and Operations, and Exhibit A of the amended orders stated that certain real estate activities were permitted as constituting Designated Businesses and Operations. However, the orders may properly be read to designate businesses and operations within the jurisdiction of the county, not those outside the state of Hawaii. This proper reading is supported by the governor’s amendment of his stay-home or order to remove travel to leave the state from the list of permitted travel. No amendment to the County Order gave Tenant a clear exception to the stay-home mandate such that Tenant could legally travel to Provo to take occupancy of the apartment in Provo.

\textsuperscript{19} In a prehearing conference Landlord asked for a protective order to protect an individual from social media attacks against her if she testified she traveled from Hawaii to the airport to depart the state. While such an order was approved, the witness never testified. Even though such evidence was not presented in the hearing, I accept that some Honolulu residents may have left the state by air travel in apparent violation of the County Order. However, I also received testimony of thousands of citations, invoking criminal penalties for violating such orders in Honolulu, and the testimony is corroborated by news media reports. Had Tenant attempted to leave her home to travel to the airport to fly to Provo, she may have become one of those thousands of individuals cited. She was not required to undertake that risk in order to attempt to meet the contract terms.

\textsuperscript{20} Especially without clear briefing on the claim of unconstitutionality of the County Order, I am unprepared to start down a road that may lead to a decision that relies on a finding that an order of the Mayor of the City and County of Honolulu is unconstitutional. A federal court has observed, regarding a somewhat different constitutional question about the impact of Hawaii’s orders on inbound travel,

\begin{quote}
Although the right to travel within the United States is constitutionally protected, that does not mean that a temporary quarantine cannot be instituted in certain areas when evidence shows that unlimited travel there would directly and materially interfere with the safety and welfare of that area…. [A]ssuming the quarantine is subject to strict scrutiny instead of the highly deferential \textit{Jacobson} standard, it is narrowly tailored to promote a compelling governmental interest - preventing the importation and spread of COVID-19 and avoiding an overwhelmed health care system. \textit{Carmichael v. Ige}, 2020 U.S. Dist. LEXIS 116860 at *28 (D. Hawaii July 2, 2020).
\end{quote}

\textsuperscript{21} \textit{Bitzes v. Sunset Oaks, Inc.}, 649 P.2d 66, 69 (Utah 1982) (“The courts have required a promisor seeking to excuse himself from performance of his obligations to prove… that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if… counterperformance remains valuable.”) (quoting \textit{Castagno v. Church}, P.2d 1282, 1284 (Utah 1976) (internal citations omitted)).
parties,\textsuperscript{22} rather than merely among the benefits of the contract - a high bar, as Landlord pointed out in briefing and during the arbitration hearing. Utah courts have made clear that if Landlord’s performance of the contract remains valuable, the purpose of the contract is not frustrated.

This case is distinct from other cases in this series of pandemic-related arbitrations in which both of the following were true: “The apartment is still BYU approved housing that has been and still is available for occupancy by Tenant.”\textsuperscript{23} Here, due to government orders that were unforeseeable to either party at the time the contract was executed, Landlord could not make the apartment available for occupancy by Tenant because she could never legally get to the apartment to take occupancy and enjoy any of the benefits of the contract, including its principal purpose. Once Tenant and her family became aware of their legal burden to show that “the value of counterperformance [was] totally or nearly totally destroyed,”\textsuperscript{24} they assembled the documentation appropriate to make that showing and provided it to Landlord and to the arbitrator. Having carefully reviewed all the facts and questions of law, I find that Tenant has met her burden. She has shown that the central purpose of the contract was frustrated.

**Summary, Conclusion and Ruling**

While Tenant initially sought termination of the lease under paragraph 23B, she did not need to make out a claim for termination under that provision as she is excused from performance of the lease by the doctrine of frustration of purpose. Tenant was home in another state when government orders made it illegal for her to travel to Provo to take occupancy of the apartment and begin spring term in person at BYU. The specific, direct effect of the pandemic upon Tenant destroyed the principal purpose of the lease, rendering it pointless and counterperformance without value because Tenant was prevented, by unforeseeable governmental actions which were out of her control, from occupying the apartment. Tenant is excused from all her obligations of the lease by the doctrine of frustration of purpose.

Tenant is entitled to the return of her deposit and Landlord is directed to forward it to her.

Dated: July 21, 2020

*Anthony W. Schofield*  
Arbitrator


\textsuperscript{23} Ruling # 12, p. 5. Available at [https://cpcr.byu.edu/files/Arbitration%20Ruling%20Twelve_Redaction.pdf](https://cpcr.byu.edu/files/Arbitration%20Ruling%20Twelve_Redaction.pdf).  

\textsuperscript{24} *Id.*