

4 July 2025

REF: SHA/ 26535

**APPEAL AGAINST DORSET ICB DECISION
REGARDING A BREACH NOTICE AT SNJ HEALTH LTD
T/A JHOOTS PHARMACY (FHG74) 45 BROAD STREET,
LYME REGIS, DT7 3QF**

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Tel: 020 3928 2000
Email: nhsr.appeals@nhs.net

1 Outcome

- 1.1 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decision of the Commissioner to issue the Breach Notice and withhold remuneration.

A copy of this decision is being sent to:
SNJ Health Ltd t/a Jhoots Pharmacy (FHG74)
Dorset ICB

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1 The Breach Notice

A Breach Notice dated 27 January 2025 was sent to Jhoots Pharmacy (FHG74) ("the Appellant") in respect of 45 Broad Street, Lyme Regis, DT7 3QF (the "Breach Notice"):

- 1.1 "I am writing to inform you that the South West Pharmaceutical Services Regulatory Committee (SW Committee) met on **Thursday 05 September 2024**, where they were made aware that you were not providing pharmaceutical services at the above pharmacy for your contracted hours from **Wednesday 17 April 2024** to your last day of trading on **Wednesday 04 September 2024**.
- 1.2 The decision was made by the PSRC, in line with your Terms of Service for NHS Pharmacists Schedule 4, Part 4, Paragraph 23 (1) and 23 (7) that the attached Breach Notice be served along with a withholding.
- 1.3 My team have fed back from their regular meetings with your colleague, [DL]. I am aware of some of the challenges you have faced, both internally and with health partners or landlords, as you seek to stabilise your expanded business. As with any community pharmacy to whom we issue a Breach Notice and withholding, I would encourage you to seek support from your professional body and/or from Community Pharmacy Dorset.
- 1.4 **BREACH NOTICE**
- 1.5 **Name of Contractor: (FHG74) SNJ Health Ltd t/a Jhoots Pharmacy**
- 1.6 **Address of Premises: 45 Broad Street, Lyme Regis, DT7 3QF (The Contractor)**
- 1.7 This is a Breach Notice issued by NHS South West Collaborative Commissioning Hub, referred to as the "**Commissioner**" in this breach notice, on behalf of **NHS Dorset Integrated Care Board (ICB)** under regulation 71 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. Issue of this Notice has been approved by the NHS South West Pharmaceutical Services Regulations Committee ("**the SW Committee**").
- 1.8 **Nature of the Breach**
- 1.9 Contrary to paragraph 23(1) and 23(7) of schedule 4 of the Terms of Service for NHS Pharmacists, the Contractor did not provide pharmaceutical services for its contracted hours from **Wednesday 17 April 2024** until **Wednesday 04 September 2024**.
- 1.10 The Contactor submitted a short notice market exit application in relation to the above pharmacy, as the contractor was unable to open the pharmacy to provide

pharmaceutical services. This was considered by the SW Committee under Regulation 67 on **Thursday 05 September 2024**. The shorter notice period was rejected by the SW Committee and the Contractor was required to serve their full Market Exit notice – with their last day of trading being **Wednesday 04 September 2024**.

1.11 **Statement of Reasons**

1.12 On **Wednesday 17 April 2024**, the Contractor notified the Commissioner that pharmaceutical services would not be provided between: 09:00-13:00 and 14:00-17:30 (7.5 hours). The Commissioner was informed by the Contractor they were unable to enter the building due to a bailiff notice enforced by the landlord.

1.13 From **Wednesday 17 April 2024**, therefore, the Contractor was unable to provide pharmaceutical services at their premises for their contracted hours, due to the landlord refusing to negotiate a further lease at the site, following their change of ownership from Lloyds.

1.14 From this date, patients were given the option to transfer to the Contractors neighbouring pharmacy premises at Lyme Regis Community Care, Uplyme Road, Lyme Regis DT7 3LS or choose another pharmacy.

1.15 The contractor is required to open the following contractual hours each day:

Monday – Friday		Saturday		Sunday	
Core	Supplementary	Core	Supplementary	Core	Supplementary
09:00-13:00 14:00- 17:30	None	09:30-11:30	11:30-13:00 14:00-17:00	Closed	Closed

1.16 Total of **40.5** core hours and **4.5** supplementary hours per week.

1.17 From **Wednesday 17 April 2024**, meetings were held weekly, between the Contractor and the Commissioner, to discuss when pharmaceutical services could be resumed. A summary of meetings is set out below:

1.17.1 Meeting on **Tuesday 07 May 2024** – the Contractor confirmed they could not find alternative premises and would submit a short notice market exit and not a consolidation application, due to the timescales needed for the application.

1.17.2 Meeting on **Friday 17 May 2024** – the Contractor confirmed they would be submitting a market exit for this site.

- 1.17.3 Meeting on **Tuesday 28 May 2024** - the Contractor confirmed they were now considering a relocation application. The Commissioner requested the Contractor submit their application as soon as possible.
- 1.17.4 Meeting on **Friday 31 May 2024** – the Contractor was unsure whether they would be submitting a relocation application or a market exit application for this site, but their preference would be a relocation application.
- 1.17.5 Meeting on **Monday 10 June 2024** – the Contractor confirmed they would now be submitting a market exit notice at this site – the Contractor was reminded of the urgency of this application.
- 1.17.6 An application for short notice market exit was received from the contractor on **Monday 13 June 2024**.
- 1.18 On **Thursday 05 September 2024**, the SW Committee considered the Contractor's short notice market exit application, noting the Contractor had not provided pharmaceutical services since **Wednesday 17 April 2024**.
- 1.19 The SW Committee was of the view that formal notice could have been given in March, when the Contractor knew there may be difficulties with the lease. It was noted that the SW CCHub had highlighted the urgent need of their application to SNJ Health Ltd several times at their weekly contract meetings. Therefore, the SW Committee determined it was not impracticable for the Contractor to provide 3 months' notice and refused their short notice application.
- 1.20 Therefore, the full three months' notice would be required by the Contractor, this would formally end their contract on **Wednesday 04 September 2024**.
- 1.21 The SW Committee went on to consider whether it was reasonable and proportionate to issue a breach notice, as the Contractor had not provided services at this site since **Wednesday 17 April 2024**. The SW Committee considered that the sustained loss of pharmaceutical service provision did justify the issue of a breach notice and a financial withholding.
- 1.22 Calculation of the financial withholding is intended to reflect paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists. The methodology applied to this withholding is detailed in Appendix 1 of this breach notice. The total withholding amounts to a sum of **£9,398.00**.
- 1.23 **Action Required**
- 1.24 The Contractor is not to repeat the breach again.
- 1.25 **Right of Appeal**
- 1.26 You have a right of appeal to the Secretary of State against the issuing of this breach notice and any related payment withholding. Should you choose to appeal, you should send a concise and reasoned statement of the grounds for your appeal within 30 days of the date of this letter to:
- 1.27 Primary Care Appeals
8th Floor
10 South Colonnade
Canary Wharf
London

E14 4PU

- 1.28 Email: nhsr.appeals@nhs.net
- 1.29 Please note that you can seek advice and support from Community Pharmacy Dorset, who are your statutory representative body and we would be happy to include them in a meeting with you in the future. If this would be helpful, please advise my colleagues at england.pharmacysouthwest@nhs.net and we will include them in meeting arrangements.
- 1.30 Withholdings based on the following methodology
- 1.30.1 The number of core hours the pharmacy is closed each day.
- 1.30.2 The average monthly number of items dispensed - profiled down to number of items per hour.
- 1.30.3 Broken down by day – Monday to Saturday (Sunday closed) Formula used - Average No. of Items per hour multiplied by the Number of hours per day multiplied by the £1.27 (Single activity Fee daily rate)
- 1.30.4 The number of days closed which totals 118 working days.”

2 The Appeal

In a letter dated 25 February 2025 addressed to NHS Resolution, the Appellant appealed against Dorset ICB's ("the Commissioner") decision. The grounds of appeal are:

- 2.1 “Please can you accept this letter as an appeal against the decision by NHS South West Collaborative Commissioning Hub, referred to as the “Commissioner” to issue a Breach notice and subsequent withholding on behalf of NHS
- Dorset Integrated Care Board (ICB). The notice was served to us on 27th January 2025.
- 2.2 Given the circumstances faced by the pharmacy with regards [sic] to the property we feel that the Breach notice and withholding is unreasonable.
- 2.3 The ICB has issued a breach notice against a pharmacy that has closed/removed from the pharmaceutical list and the ODS Code FHG74 no longer open. The breach notice has been submitted to us over four months after the closure of the pharmacy. A withholding is therefore not appropriate. There is no opportunity for the breach to be repeated as the pharmacy has closed.
- 2.4 It is unclear as to why a withholding is being applied by the ICB as practice payments are no longer made by the NHS to the pharmacy and we would not have received any income over the period specified. The ICB says that the withholding is to reflect intended to [sic] reflect paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists. We submit a withholding [sic] is actually referred to in Regulation 70.
- 2.5 The Pharmacy FHG74 was acquired from Boots UK Ltd following change of ownership on 11th March 2024. The landlord served a bailiff notice preventing access into the pharmacy from the 14th of April 2024. This prevented us providing pharmaceutical services. As you will see from the ICB report we did notify the ICB of the inability to provide services caused by the landlord's action.

- 2.6 The ICB has suggested that we should have submitted a closure notice for the premises sooner, but we had to exhaust all options and there was no guarantee that if a closure notice was submitted it would be able to be rescinded.
- 2.7 In paragraph 3 of the breach the ICB report “The Contactor submitted a short notice market exit application in relation to the above pharmacy, as the contractor was unable to open the pharmacy to provide pharmaceutical services. This was considered by the SW Committee under Regulation 67 on **Thursday 05 September 2024**. The shorter notice period was rejected by the SW Committee and the Contractor was required to serve their full Market Exit notice – with their last day of trading being **Wednesday 04 September 2024**”. The Committee is stating they considered the closure notice, on 5th September 2024 but acknowledge that the last day of trading was 4th September 2024. This does not make sense. The consideration was after the recognised date of closure.
- 2.8 I submit that the withholding and the breach notice is unreasonable for the reason listed above and ask for this appeal to be upheld.”

3 **Summary of Representations**

This is a summary of representations received on the appeal.

3.1 The Commissioner

- 3.1.1 “Thank you for your letter dated 27 February 2025, inviting representation in response to the appeal received from SNJ HEALTH LTD T/A JHOOTS PHARMACY (FHG74) (the Contractor). The South West Pharmaceutical Services Regulations Committee (SW Committee) wishes to make the following comments on the appeal.
- 3.1.2 For clarification, this is a Breach Notice issued by NHS Dorset Integrated Care Board (ICB) (the Commissioner) under Regulation 71 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. Issue of this Notice has been approved by the NHS South West Pharmaceutical Services Regulations Committee (the SW Committee), the decision making body for the Commissioner. The South West Collaborative Commissioning Hub (SW CCHub) delivers the ICBs commissioning responsibilities for Community Pharmacy. The financial withholding was issued in relation to the above breach.
- 3.1.3 Please treat the attached as part of the SW Committee representations on this appeal:
- 3.1.3.1 **Appendix A – Temporary Suspensions**
- 3.1.3.2 **Appendix B – Short Notice Market Entry Application**
- 3.1.3.3 **Appendix C – Breach Notice PSRC Paper.**
- 3.1.3.4 **Appendix D – SW Committee notes**
- 3.1.3.5 **Appendix E – Temporary Suspension Policy**
- 3.1.4 The Contractor has the following Core opening hours: 09:00-13:00 and 14:00 -17:30 Monday to Friday and 09:00-11.30 on a Saturday. The Contractor also

has 4.5 Supplementary Hours which are 11:30-13:00 and 14:00-17:00 on a Saturday.

- 3.1.5 On **17 April 2024** the Contractor notified the Commissioner that pharmaceutical services would not be provided between: 09:00-13:00 and 14:00-17:30 (7.5 hours). The Commissioner was informed by the Contractor they were unable to enter the building due to the property being “repossessed by the landlord”. (**Appendix A**).
- 3.1.6 Notification was sent to the Commissioner by completing the Temporary Suspension Form “The Pharmacy Contractor Notification of a Temporary Suspension of Service”. (29D of Schedule 4 (2)(a)). This provides the Name of contractor, address, ODS code and contact details. It also clarifies the Date(s) of the temporary suspension of service and its anticipated duration (29D of Schedule 4, 2(a)(ii), along with the times at which pharmaceutical services were not provided. (29D of Schedule 4, 2(a)(ii)). The contractor continued to submit the temporary suspension forms for the period **17 April 2024** until **04 September 2024**.
- 3.1.7 On the 05 September 2024, the Contractor’s Short Notice Market Exit Application, was reviewed under Regulation 67 by the SW Committee. This application was not agreed, noting that maintenance of lease agreements are within the control of the contractor, including as part of due diligence associated with changes of ownership. It was noted that on the contractor’s final market exit date of 4th September 2024, the pharmacy would have ceased providing pharmaceutical services for 118 days, with a total of 785 hours lost, therefore a decision to issue a breach was made by the SW Committee and a withholding applied.
- 3.1.8 Whilst the Short Notice Market Exit application was originally submitted on the 13 June 2024, the Contractor requested more time to submit further supporting evidence **Appendix B** [appendix A and see 3.1.19 below]. The additional information was finally submitted by the Contractor on the 07 August 2024 and the application taken to the SW Committee on 5th September 2024.
- 3.1.9 The report presented to the SW Committee confirmed the Contractor had not provided Pharmaceutical Services from 17 April 2024 until their last day of Market Exit on 04 September 2024. The breach notice was presented to the South West Pharmaceutical Services Regulation Committee for consideration of a breach of terms of service: see **Appendix C** [see 3.1.26 below]. The SW Committee’s decision was the contractor was in breach of their terms of service. **Appendix D** [see 3.1.65 below].
- 3.1.10 When considering this application, the SW Committee reflected on what was the correct application date to use: 13 June or 7 August 2024. In this instance it was felt reasonable to use the original date of application, **13th June 2024**.
- 3.1.11 Whilst the Contractor submitted their Market Exit notice, they have not been formally removed from the pharmaceutical list or their ODS code closed, due to the outstanding breach notice issued. They will continue to remain on the list until the outcome of this breach notice is determined by Primary Care Appeals – NHS Resolution.
- 3.1.12 The NHS SW CCHub apologises for the delay in sending the breach notice to the Contractor. This was in part due to the uniqueness of this situation, alongside the team dealing with multiple contractual breaches for the same

Contractor. Learning from this case has implemented stricter processes for the issuing of breaches.

- 3.1.13 In considering the approach to calculating a financial withholding, the SW Committee decided it would not be reasonable to use the total days closed under the South West Temporary Suspensions Policy **Appendix E** [appendix C]. It was agreed the applied methodology in this withholding (using a single activity fee) would be fairer to the contractor, given the length of time the pharmacy was closed. The withholding was issued for the term that the pharmacy should have been open.
- 3.1.14 The withholding is issued in relation to the above breach and was considered in line with Regulation 71.
- 3.1.15 The Contractor did inform the Commissioner of the issues with the landlord, indicating they was considering a relocation to another premises. When a pharmacy cannot provide pharmaceutical services this is particularly concerning to the SW Committee, due to the potential negative impact on patient care and local communities, in restricting their access to medication. This can also impact on other services and displace activity to other parts of the NHS which are already under significant pressure, such as GP practices, neighbouring Community Pharmacies, urgent care, or A & E.
- 3.1.16 The Commissioner has been working closely with Jhoots since 2023, supporting them with weekly meetings, to manage a number of contractual issues at various sites across the South West.
- 3.1.17 In the meetings held on 07 May 2024, 17 May 2024, 28 May 2024, 31 May 2024 and the 10 June 2024, with the Contractor they were undecided whether to relocate or submit a market exit at this site. It wasn't until the meeting of the 10 June 2024, did they confirm they would be submitting a short notice market exit. These supportive meetings were held to try and help resolve the situation locally, however, at the 10 June 2024 meeting, it was clear that no services would be provided at this branch and they were in breach of their terms of service.
- 3.1.18 The SW Committee looks forward to receiving the Primary Care Appeals' decision in due course."

Email dated 7 August 2024 from the Appellant to the Commissioner

- 3.1.19 "Below is a statement outlining the events leading up to the Lyme Regis Market Exit application.
- 3.1.20 We agreed to purchase the Pharmacy from Boots and had been given reassurances that whilst they were holding over on the lease the landlord would be wanting to re-negotiate the lease with us.
- 3.1.21 Upon entering the property on 26/02/2024 discussions to agree a new lease began, the landlord subsequently issues [sic] a notice through the solicitors instructing us to vacate the property.
- 3.1.22 As a result of a similar situation at another site, which lead [sic] to the landlord taking possession of the property overnight and patients being unable to access their medication for an extended period, the decision was made to

move the pharmacy into our nearby site, Uplyme Road, Lyme Regis, Dorset, DT7 3LS.

- 3.1.23 We took the above action to ensure that there would be no disruption to patients, a member of staff was left at the site to signpost patients to our other store and ensure patients queries could be answered.
- 3.1.24 All patients were directed to our other site, the staff moved over also allowing the pressures from merging the two pharmacies to be easily accommodated. We have liaised with patients and gained their consent to now nominate them to the previously [sic] Lloyds Pharmacy.
- 3.1.25 The store is now settled and has delivered a successful covid programme alongside the additional prescription demand from the closed site, we offer a free delivery service for any patients that cannot travel across Lyme Regis to enable them to continue to access their prescriptions.”

PSRC paper dated October 2024

- 3.1.26 **“Applicant** - FHG74 SNJ Health Ltd T/A Jhoots Pharmacy Lyme Regis
- 3.1.27 **Address of current premises** - 45 Broad Street, Lyme Regis DT7 3QF
- 3.1.28 **H&WB board area** - Dorset
- 3.1.29 **Fitness to Practise** - Already held
- 3.1.30 Enclosures
- 3.1.31 Annex 1 – Breach Notice Proposal [appendix B]
- 3.1.32 Annex 2 – Proposed withholding calculation for agreement
- 3.1.33 **Background**
- 3.1.34 The contractor SNJ Health Ltd (Jhoots) premises were closed from the 17 April 2024 due to an enforced bailiff notice, put in place by the landlord, as they failed to extend their short notice lease following their change of ownership from Lloyds. Patients were given the option to transfer to their neighbouring pharmacy premises at Lyme Regis Community Care, Uplyme Road, Lyme Regis DT7 3LS or choose their own pharmacy.
- 3.1.35 SNJ Health Ltd (Jhoots) decided not to look for alternative premises and made [sic] application on the 17 June 2024, for a short notice Market Exit under regulation 67 which was declined by the SW Committee.
- 3.1.36 The SW Committee determined that: it was not impracticable for the contractor to provide 3 months’ notice and would require the Contractor to give the whole 3 months.
- 3.1.37 The SW Committee determined a breach notice for the failure to provide the required 3 months’ notice was required and should include a withholding (amount to be agreed/determined). The SW Committee asked that the PC team suggest a mechanism for calculating a withholding for the SW Committee to approve. A shorter notice period was not considered as the contractor stopped providing services on the 17 April 2024.

3.1.38 This paper is to agree the proposed breach and withholding for the above contractor.

3.1.39 **Proposed Breach and Modelling of the Withholding**

3.1.39.1 The proposal is to use a calculation based the average number of items dispensed per hour, calculating the cost by withholding what would be the single activity fee for of these items. The single activity fee is the fee given to the contractor for each item dispensed.

3.1.39.2 The withholdings calculation is based on the pharmacy's core 40 hours.

3.1.39.3 The proposal is to start withholdings from the original date of closure 17 April 2024 to their last day of trading 04 September 2024.

3.1.40 **Core Hours**

3.1.41 The Pharmacy opens a total of forty core hours – 09:00-13:00 and 14:00 -17:30 Monday to Friday and 09:00-11.30 on a Saturday.

3.1.42 **Dispensed Items**

3.1.43 The model would normally use the average number of dispensing items per month however, this contractor did not submit any claims under their ODS code for this site, leaving no figures to use. An alternative option would need to be applied.

3.1.44 Therefore, it is proposed to use:

3.1.44.1 The difference between - their monthly average number of items processed at their Pharmacy at Uplyme site before the closure and their average number of items processed after the closure. This is based on the fact that most patients would have moved over to the Uplyme Pharmacy located at Lyme Regis Community Care, Uplyme Road, Lyme Regis DT7 3LS.

3.1.45 This is reflected in the table below from March onwards, showing an increase in the number of items dispensed at the Uplyme Pharmacy.

Changes to Uplyme base as a result of the closure of Lyme Regis		
Up Lyme Medical Centre	Dispensed Items	
202308	12	
202309	5615	
202310	5799	

202311	5370	
202312	5657	
202401	6004	
202402	5918	
202403	7731	Average
Grand total	42106	6013
202404	7764	
202405	7855	Average
202406	9155	8258

3.1.46 Their monthly average number of items dispensed at the Uplyme Pharmacy had an average of 6013 before the closure and an average of 8258 after the closure, which is an increase of 2245 items between the two. This is the figure which is proposed to base the modelling on.

3.1.47 To note that before the change of ownership the established FTY01 Boots Pharmacy dispensed an average of 3394 items per month, so using the average of 2245 items seems a reasonable starting point.

3.1.48 The Modelling

3.1.49 Using a calculation of:

3.1.49.1The average number of dispensed items per month 2245.

3.1.49.2The number of hours worked each week (40 Hours).

3.1.49.3Divide 2245 by 40 gives an average number of items dispensed weekly and hourly to give an (hourly rate).

How to do you find number of items per hour?	
Average No of Items per month	2245
Divide by four to give you a week figure	561
Divide by 40 hr week gives you number items per hour	14

3.1.50 The calculation is shown broken down by day, as on a Saturday the pharmacy opens 2.5 core hours and is closed on Sunday.

3.1.51 **The Proposal**

- 3.1.52 **Modelling for the closure period before the Market Exit notice was submitted** – it is proposed to apply the modelling from the start of the closure 17th April 2024, until the date of Market Exit application 16th June 2024. Working on the principal the pharmacy should have been working at 100% capacity until the date they told their patients they were closing 17th June 2024.

How to do you find number of items per hour?	
Average No of Items per month	2245
Divide by four to give you a week figure	561
Divide by 40 hr week gives you number items per hour	14

- 3.1.53 **Calculation is therefore: Hourly Rate (14 items) X Number of Hours X £1.27**

- 3.1.54 **The full modelling breakdown and costs are shown in Appendix 1 – with the full detail in Appendix 2 (Spreadsheet)**

- 3.1.55 **Modelling for Notice period after the Market Exit notice was submitted** – the modelling changes as it is expected when a pharmacy gives notice, they routinely see a reduction in items dispensed as patients transfer to other pharmacies, so it is proposed using a reducing model of:

	Month 1	Month 2	Month 3
How to do you find number of items per hour? [sic]	100%	40%	20%
Average No of Items per month	2245	898	449
Divide by four to give you a week figure	561	225	112
Divide by 40 hr week gives you number items per hour	14	6	3

- 3.1.56 **(Month 1) 17th June – 14th July 14 Items per hour**
- 3.1.57 **(Month 2) 15th July – 11th August 6 Items per hour**
- 3.1.58 **(Month 3) 12th August - 4th September 3 Items per hour**
- 3.1.59 The calculation is:
- 3.1.60 **Hourly Rate (14/6/3 depending on month) X Number of Hours X £1.27**

3.1.61 **The modelling breakdown and costs by month are shown in Appendix 1**

3.1.62 For the full period including if the full three months' notice is applied the total withholdings for the period amount to **£10,201.28**.

3.1.63 **Recommendation for the Committee:**

3.1.63.1 Issue a breach notice for the period 17 April 2024 – 04 September 2024 as the contractor was unable to provide pharmaceutical services for this period including their Market Exit notice period.

3.1.63.2 Applying the withholdings model to the contractor for the period they were closed basing on 40-hour week, 17 April – 16 June 2024 at 14 Items per hour.

3.1.63.3 Applying withholdings to the contractor for the remaining period on a reduced modelling scale 17th June – 4th September 2024 holding the contractor to their full three months' notice.

3.1.64 The total withholdings for the period amount to:

Total April	£1,422.40
Total May	£2,978.15
Total June	£2,889.25
Total July	£2,025.65
Total August	£800.10
Total September	£85.73
Total Withholding	£10,201.28

Extraction from the Commissioner's notes

3.1.65 "Then it went to PSRC again on 16th October after another paper was presented with the suggestion of a mechanism for withholding. This is the decision from October from the minutes:

3.1.66 Decision:

3.1.67 The SW Committee is of the view that the Sum needs to be amended, as the average number of weeks in a month is 4.3 not 4.

3.1.68 The SW Committee noted the difficulties for other local service providers caused by the short notice closure.

3.1.69 The SW Committee agreed to withholding applied from the date the pharmacy closed and not the date the notice was given.

3.1.70 The SW Committee noted that as activity data was not available for the closing site, the data from the previous owners surrounding pharmacies has been used for the calculation.

3.1.71 The SW Committee agreed to issue a breach notice, calculated from the 17th April with weeks per month amended to 4.3.”

4 Observations

No observations were received by NHS Resolution in response to the representations received on appeal.

5 Consideration

5.1 Under Regulation 71(1) “Breaches of terms of service: breach notices” of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”), a breach notice may be issued:

71. (1) Where an NHS chemist (C) breaches a term of service and the breach is not capable of remedy, NHS England may by a notice (“a breach notice”) require C not to repeat the breach.

5.2 I note that in the Regulations an NHS Chemist means “*an NHS appliance contractor or an NHS pharmacist*”. An NHS pharmacist is defined as “*a person included in a pharmaceutical list of the type referred to in regulation 10(2)(a);*”. Regulation 10(2)(a) states:

10(2) “Those lists (which are pharmaceutical lists) are

(a) a list of persons who undertake to provide pharmaceutical services in particular by way of the provision of drugs;”

5.3 The Regulations contain no definition as to what constitutes a breach of terms of service which is not capable of remedy.

5.4 I note that there is no dispute that the Appellant is included on the pharmaceutical list for premises that are not the subject of this appeal.

5.5 I note that the Breach Notice was issued pursuant to Regulation 71(1) and is compliant with the requirements of a breach notice as it includes the nature of the breach and an explanation of the Appellant’s right of appeal under Regulation 77(1)(c).

5.6 I note that, in the Breach Notice, it states “*From Wednesday 17 April 2024, meetings were held weekly, between the Contractor and the Commissioner, to discuss when pharmaceutical services could be resumed.*” This is followed by a summary of the meetings.

5.7 I am of the view that the Appellant had the opportunity to enter into local dispute resolution with the Commissioner as part of the decision making process. I note that there is no dispute raised by either party that the local dispute resolution process has not been exhausted. Given that both parties do not dispute that local dispute resolution has been exhausted I am content that I can deal with this matter.

5.8 I note that the Appellant seeks to appeal against both the Breach Notice and the decision to withhold remuneration.

- 5.9 I consider that, in relation to the Breach Notice, and the question of the breach itself the Appellant has stated that there is "*no opportunity for the breach to be repeated*", refers to the fact that the pharmacy premises had closed and that the circumstances faced by the pharmacy needed to be considered.
- 5.10 I note that the regulatory reference provided by the Appellant was that of Regulation 70. I consider that this is incorrect. As per the Breach Notice, and the Commissioner's representations, the Breach Notice was issued under Regulation 71, not Regulation 70.
- 5.11 I note that Regulation 71 does not contain a requirement relating to whether the breach is likely to be repeated, but instead the notice itself will require the Appellant not do so. However, I am mindful that there may be no point in issuing a notice requiring that the breach not be repeated, if it is not possible for it to be repeated.
- 5.12 To that end I note that, as per paragraph 5.2 above, Regulation 71 relates to whether an NHS chemist has committed a breach of service, it does not specify in relation to which pharmacy premises. I further note that as per the Appellant and the Commissioner comments, the Appellant operates a pharmacy premises within the same area as FHG74 ("Pharmacy A"), this being FM042 ("Pharmacy B"), which remains open. I note that under Regulation 75(5) where pharmacy premises are removed from a pharmaceutical list the NHS chemist will remain on said list if there are other chemist premises listed in the relevant pharmaceutical list in relation to them.
- 5.13 I therefore, consider that the Appellant remains an NHS chemist for the purpose of Regulation 71 and would continue to be so long as it remained on the pharmaceutical list by virtue of its operation of Pharmacy B. It follows, therefore, that, even if Pharmacy A was removed the pharmacy list, then the Appellant would still be able to repeat the breach, in relation to Pharmacy B. I consider that this would justify the issuing of a breach notice.
- 5.14 In relation to the secondary issue raised by the Appellant, regarding the Breach Notice being issued some 4 months later, I note that there is no time limit specified in Regulation 71 and I have not been provided with any other reason, by the Appellant why such action was not available to the Commissioner.
- 5.15 I therefore turn my attention to the question of whether a breach took place. I note that this is inherently linked to the question of whether the Appellant was entitled to submit a closure notice for the premises sooner than they did. I note that the current appeal relates to the Breach Notice, not the decision to allow for a shorter notice for market exit, hence I will only briefly consider the Appellant's arguments, for the sake of completeness.
- 5.16 The Appellant states that it had to exhaust all options prior to submitting a closure notice. I note that Regulation 67(2) provides that the Appellant should have notified the Commissioner as soon as practicable regarding closure, otherwise, it is for the Commissioner to agree to a shorter notice period. I consider that, by the Appellant's own admission, they waited to make the closure notification, which I do not consider to be "as soon as practical" for the purposes of Regulation 67(2). Given that the Commissioner has wide discretion to take a decision to accept a voluntary closure notification, and the lack of details relating to this issue, I will consider the issue no further, and accept the decision of the Commissioner in relation to this issue.
- 5.17 Having considered that the shortened notification period had not been accepted by the Commissioner, then the Appellant was clearly in breach of its terms of service when the pharmacy premises were not open from the period of 17 April 2024 until 4

September 2024, contrary to paragraph 23(1) and 23(7) of Schedule 4 of the Terms of Service for NHS chemists. Given that this clearly amounts to a breach of the terms of service by the Appellant, and that they remain on the pharmaceutical list, then, as per Regulation 71(1) the Commissioner could issue a breach notice requiring the Appellant not to repeat this breach and would have good reason for doing so.

- 5.18 I will next consider the issue of withholding. I consider that this issue is similar to the question of whether the breach could be repeated. I note that in terms of the withholding the Appellant has stated that this is not reasonable due to the pharmacy having been "closed/removed from the pharmaceutical list".
- 5.19 I again return to the language of Regulation 71, and the fact that the withholding is not against particular pharmacy premises, but is against the NHS chemist. I thus must conclude that the closure of the pharmacy premises would only be relevant if it resulted in the Appellant ceasing to be an NHS chemist, which, as I have established, is not the case.
- 5.20 I note that Regulation 71(3) provides for the circumstances when the Commissioner can seek to withhold remuneration:
- "If the breach relates to a failure to provide, or a failure to provide to a reasonable standard, a service that C is required to provide, the breach notice may provide that, as regards the period during which there was a failure to provide, or a failure to provide to a reasonable standard, that service, NHS England is to withhold all or part of the remuneration due to C under the Drug Tariff or a determination as mentioned in regulation 91(6) in respect of that period"*
- 5.21 I have already considered that the Appellant had failed to provide a service, that it was required to provide, between 14 April 2024 and 4 September 2024, in relation to Pharmacy A. Therefore, I consider that the first part of this Regulation is met. The next question becomes whether there is any remuneration due to the Appellant.
- 5.22 As noted above the Appellant has stated that Pharmacy A has closed, and thus there is no remuneration due to the Appellant in relation to those premises. I note that this could prevent a withholding being appropriate. However, I am mindful of the fact that the language of Regulation 71(3) does not apply in respect of a specific pharmacy premises but is in respect of an NHS chemist, denoted by "C". As I have established, the Appellant remains an NHS chemist, and as such is entitled to remuneration, even if it is in respect of Pharmacy B, rather than Pharmacy A.
- 5.23 As the Appellant has not provided a service, in consequence of which the Appellant is in breach of a term of service and is receiving remuneration then I consider that a withholding by the Commissioner is permitted in accordance with Regulation 71.
- 5.24 I note that there is a slight discrepancy between the information provided by the Commissioner in relation to the amount for recovery in the Breach Notice provided by the Appellant and its representations. However, I note the final paragraphs explain that the division number for calculation of an item per week figure was later increased to 4.3. I consider that this explains the reduction in amount.
- 5.25 I note that the Appellant has, by its own admission, confirmed that it directed users of Pharmacy A to its own Pharmacy B, and the Commissioner has provided information which confirms that this resulted in an increase of items dispensed at that location. Having reviewed the explanation provided by the Commissioner and the modelling used, I concur that this figure is reasonable in the Appellant's circumstances, and warranted.

- 5.26 Taking all of this information into account, I do not consider the decision by the Commissioner to issue the Breach Notice, nor to withhold remuneration of the amount of £9,398.00 from the Appellant, unreasonable in the circumstances, and I have not been provided any other reasoning by the Appellant as to why I should not confirm the decision of the Commissioner.

6 Decision

- 6.1 I am of the view that under NHS Resolution's powers, as set out in paragraph 9(5) of Schedule 3 to the Regulations, I may either confirm the decision of the Commissioner or substitute for that decision any decision that the Commissioner could have taken when it took that decision.
- 6.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decision of the Commissioner to issue the Breach Notice and withhold remuneration.

**Head of Appeals
NHS Resolution**