

## **[Xcel Fitness, LLC] Terms and Conditions of Use and Privacy Policy**

Last Updated [November] [15], 2020.

**IMPORTANT – PLEASE CAREFULLY READ AND UNDERSTAND THESE TERMS AND CONDITIONS OF USE AND PRIVACY POLICY (“TERMS”) BEFORE ACCESSING OR USING [www.xcelfitnessmn.com]. THESE TERMS CONTAIN DISCLAIMERS OF WARRANTIES AND LIMITATIONS OF LIABILITIES (see Sections 2 and 3). THESE TERMS FORM AN ESSENTIAL BASIS OF OUR AGREEMENT. PLEASE PRINT AND RETAIN A COPY OF THIS AGREEMENT FOR YOUR RECORDS.**

The use of [www.xcelfitnessmn.com] (hereafter “Website”), which is owned and maintained by [Xcel Fitness, LLC] (the “Company,” “we,” “our,” “us”), is governed by the policies, terms, and conditions set forth below. Please read them carefully. We offer the Website, including all information, tools, and services available from the Website to you, the user (“You” or “Your”) conditioned upon your acceptance of all terms and conditions stated here. By accessing or using the Website, you agree to the terms set forth herein. **If you do not agree to these Terms in their entirety, you are not authorized to use the Website.**

THESE TERMS FORM A LEGALLY BINDING AGREEMENT (“AGREEMENT”) BETWEEN YOU AND THE COMPANY AND SHOULD BE READ CAREFULLY. THIS AGREEMENT GOVERNS YOUR ACCESS TO AND USE OF THE WEBSITE, THE SERVICES PROVIDED BY THE COMPANY, AND YOUR USE OR ATTEMPTED USE OF THE PRODUCTS OR SERVICES OFFERED BY THE COMPANY.

**THIS AGREEMENT CONTAINS ARBITRATION AND CLASS ACTION WAIVER PROVISIONS THAT WAIVE YOUR RIGHT TO A COURT HEARING, RIGHT TO A JURY TRIAL, AND RIGHT TO PARTICIPATE IN A CLASS ACTION. ARBITRATION IS MANDATORY AND IS THE EXCLUSIVE REMEDY FOR ANY AND ALL DISPUTES UNLESS SPECIFIED BELOW IN SECTION 4.**

We reserve the right, at our sole discretion, to update, change or replace any part of the Agreement, by posting updates and changes to our Website. It is your responsibility to check our Website periodically for changes. Your continued use of or access to our Website following the posting of any changes to the Agreement constitutes acceptance of those changes.

### **SECTION 1 – WEBSITE USE AND CONDUCT RESTRICTIONS**

By using the Website, you represent that you are at least the age of majority in your state or province of residence. If you use the Website, you are affirming that you have the legal capacity to enter into a binding contract with us, and have read this Agreement and understand and agree to its terms.

All aspects of our Website are protected by U.S. and international copyright, trademark, and other intellectual property laws, including all design elements, text material, logos, taglines, metatags,

hashtags, photographic images, personal stories, icons, video and audio clips, personal training sessions, and downloads. No material on or provided through the Website may be copied, reproduced, distributed, republished, uploaded, displayed, posted, or transmitted in any way whatsoever. Nothing herein gives you the right to use, copy, register as a domain name, reproduce, or otherwise display any logo, tagline, trademark, trade name, copyrighted material, trade dress, trade secret, or other proprietary or confidential information owned by Company. Commercial use of such information is strictly prohibited, except as provided otherwise in these Terms.

Subject to your continued strict compliance with all Terms, Company provides to you a revocable, limited, non-exclusive, royalty-free, non-sublicensable, non-transferable license to use the Website. You acknowledge and agree that you do not acquire any ownership rights in any material protected by intellectual property laws.

You agree not to use or attempt to use the Website in any unlawful manner. You further agree not to commit any unlawful act or attempt to commit any unlawful act on or through the Website including, but not limited to: (1) hacking and other digital or physical attacks on the Website; (2) publishing vulgar, obscene, or defamatory material; or (3) any other unlawful act.

## **SECTION 2 – DISCLAIMERS OF WARRANTIES**

EXCEPT WHERE OTHERWISE INAPPLICABLE OR PROHIBITED BY LAW:

YOU EXPRESSLY AGREE THAT YOUR USE OF, OR INABILITY TO USE, THE WEBSITE AND THE SERVICES IS AT YOUR SOLE RISK. THE WEBSITE AND THE MATERIALS AND SERVICES CONTAINED AND OFFERED ON THE WEBSITE AND OTHERWISE BY THE COMPANY ARE PROVIDED ON AN “AS IS”, “AS AVAILABLE” BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF TITLE OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. WE MAKE NO, AND EXPRESSLY DISCLAIM ANY AND ALL, REPRESENTATIONS AND WARRANTIES AS TO THE RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, AVAILABILITY, ACCURACY, AND/OR COMPLETENESS OF ANY INFORMATION ON THIS WEBSITE. WE DO NOT GUARANTEE, REPRESENT OR WARRANT THAT YOUR USE OF OUR WEBSITE WILL BE UNINTERRUPTED, TIMELY, SECURE OR ERROR-FREE. WE DO NOT WARRANT THAT THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE WEBSITE WILL BE ACCURATE OR RELIABLE. YOU AGREE THAT FROM TIME TO TIME WE MAY REMOVE THE WEBSITE FOR INDEFINITE PERIODS OF TIME OR CANCEL THE WEBSITE OR ANY PRODUCT OR SERVICE AT ANY TIME, WITHOUT NOTICE TO YOU.

## **SECTION 3 – LIMITATIONS OF LIABILITIES**

EXCEPT WHERE OTHERWISE INAPPLICABLE OR PROHIBITED BY LAW, IN NO CASE SHALL THE COMPANY, OUR DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, CONTRACTORS, SUPPLIERS, SERVICE PROVIDERS, OR LICENSORS BE LIABLE FOR ANY INJURY, LOSS, CLAIM, OR ANY DIRECT, INDIRECT, INCIDENTAL,

PUNITIVE, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING, WITHOUT LIMITATION LOST PROFITS, LOST REVENUE, LOST SAVINGS, LOSS OF DATA, REPLACEMENT COSTS, OR ANY SIMILAR DAMAGES, WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STATUTE, STRICT LIABILITY, OR OTHERWISE, ARISING FROM YOUR USE OR ATTEMPTED USE OF ANY PART OF THE WEBSITE OR PRODUCTS OR SERVICES PROVIDED BY THE COMPANY, OR FOR ANY OTHER CLAIM RELATED IN ANY WAY TO YOUR USE OR ATTEMPTED USE OF THE WEBSITE OR ANY PRODUCT OR SERVICE, INCLUDING, BUT NOT LIMITED TO, ANY ERRORS OR OMISSIONS IN ANY CONTENT, OR ANY LOSS OR DAMAGE OF ANY KIND INCURRED, EVEN IF ADVISED OF THEIR POSSIBILITY.

IF, NOTWITHSTANDING THE LIMITATION OF LIABILITY SET FORTH ABOVE, THE COMPANY IS FOUND LIABLE UNDER ANY THEORY, THE COMPANY'S LIABILITY AND YOUR EXCLUSIVE REMEDY WILL BE LIMITED TO THE LESSER OF (I) USD \$1,000.00, OR (II) THE AMOUNT YOU PAID TO THE COMPANY WITHIN THE SIX (6) MONTHS PRIOR TO THE EVENT GIVING RISE TO YOUR CLAIM. THIS LIMITATION OF LIABILITY SHALL APPLY FOR ALL CLAIMS, REGARDLESS OF WHETHER THE COMPANY WAS AWARE OF OR ADVISED IN ADVANCE OF THE POSSIBILITY OF DAMAGES OR SUCH CLAIMS. SOME STATES DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES, SO SOME OF THE ABOVE EXCLUSIONS MAY NOT APPLY TO YOU AND YOU MAY HAVE ADDITIONAL RIGHTS.

#### **SECTION 4 – DISPUTE RESOLUTION BY MANDATORY BINDING ARBITRATION AND CLASS ACTION WAIVER**

**PLEASE READ THIS ARBITRATION PROVISION CAREFULLY TO UNDERSTAND YOUR RIGHTS. EXCEPT WHERE PROHIBITED BY LAW, YOU AGREE THAT ANY CLAIM THAT YOU MAY HAVE IN THE FUTURE MUST BE RESOLVED THROUGH FINAL AND BINDING CONFIDENTIAL ARBITRATION. YOU ACKNOWLEDGE AND AGREE THAT YOU ARE WAIVING THE RIGHT TO A TRIAL BY JURY. THE RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT, SUCH AS DISCOVERY OR THE RIGHT TO APPEAL, MAY BE MORE LIMITED OR MAY NOT EXIST. YOU AGREE THAT YOU MAY ONLY BRING A CLAIM IN YOUR INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF (LEAD OR OTHERWISE) OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. YOU FURTHER AGREE THAT THE ARBITRATOR MAY NOT CONSOLIDATE PROCEEDINGS OR CLAIMS OR OTHERWISE PRESIDE OVER ANY FORM OF A REPRESENTATIVE OR CLASS PROCEEDING.**

Except as provided below and to enforce an arbitrator's decision hereunder, all disputes, controversies, or claims arising out of or relating to this Agreement or a breach thereof, our relationship, or your use or attempted use of the Website or any product or service offered by the Company, shall be submitted to and finally resolved by individual, confidential arbitration under the rules of the American Arbitration Association then in effect. The following terms shall apply. You, the Company, or any involved third party may pursue a claim. The Company agrees to final and binding confidential arbitration should it have any claims against you. Likewise, you

agree to final and binding confidential arbitration should you have any claims against the Company. By agreeing to arbitrate, you waive the right to go to court and agree instead to submit any claims to final and binding confidential arbitration. This arbitration provision sets forth the terms and conditions of our agreement to final and binding confidential arbitration and is governed by and enforceable under the Federal Arbitration Act (the “FAA”), 9 U.S.C. §§ 1-16, as amended.

**a. Commencing Arbitration**

You and the Company agree to commence any arbitration proceeding within 1 year after the claim arises and that any arbitration proceeding commenced after 1 year shall be forever barred.

**b. Arbitration Location**

If the amount in controversy is \$500 or less, then the arbitration may be conducted by telephone or by written submissions. Otherwise, the arbitration shall be conducted in [Minnesota] unless the Company otherwise agrees to arbitrate in another forum requested by you.

**c. Organization, Rules, and the Arbitrator**

We each agree that any and all claims other than those exempted below shall be submitted to final and binding confidential arbitration before a single arbitrator of the American Arbitration Association (“AAA”). The arbitrator shall be selected by agreement of the parties or, if the parties cannot agree, chosen in accordance with Rules of the AAA. The arbitration will be conducted in accordance with the provisions of the AAA’s Commercial Dispute Resolutions Procedures, Supplementary Procedures for Consumer-Related Disputes, in effect at the time of submission of the demand for arbitration. The AAA’s Rules are available at [www.adr.org](http://www.adr.org) or by calling 1-800-778-7879. The arbitrator shall have the exclusive and sole authority to resolve any dispute relating to the interpretation, construction, validity, applicability, or enforceability of these Terms and this arbitration provision. The arbitrator shall have the exclusive and sole authority to determine whether any dispute is arbitrable. The arbitrator shall have the exclusive and sole authority to determine whether this arbitration agreement can be enforced against a non-signatory to this agreement and whether a non-signatory to this agreement can enforce this provision against you or the Company.

**d. Fees**

Payment of all filing, administration and arbitrator fees will be governed by the AAA’s Rules. In our sole discretion, we may reimburse the fees charged by the arbitrator for claims totaling less than \$500.00 unless the arbitrator determines the claims are frivolous. Likewise, we will not seek attorneys’ fees and costs in arbitration unless the arbitrator determines the claims are frivolous. In all other respects, the parties shall each pay their own additional fees, costs, and expenses, including, but not limited to, those for any attorneys, experts, documents, and witnesses.

**e. Governing Law and Award**

The arbitrator shall follow the substantive law of the State of [Minnesota] without regard to its conflicts of laws principles. Any award rendered shall include a confidential written opinion and shall be final, subject to appeal under the FAA. Judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

**f. Enforceability**

This provision survives the termination of your account or relationship with the Company, bankruptcy, assignment, or transfer. If the class action waiver is deemed unenforceable (i.e., unenforceability would allow arbitration to proceed as a class or representative action), then this entire arbitration provision shall be rendered null and void and shall not apply. If a portion of this arbitration provision (other than the class action waiver) is deemed unenforceable, the remaining portions of this arbitration provision shall remain in full force and effect.

**g. Miscellaneous**

Failure or any delay in enforcing this arbitration provision in connection with any particular claim will not constitute a waiver of any rights to require arbitration at a later time or in connection with any other claims except all claims must be brought within the 1 year limitation period set forth above. This Section 4 is the entire arbitration agreement between you and the Company and shall not be modified except in writing by the Company.

**h. Exceptions**

Notwithstanding the foregoing, and as an exception to final and binding confidential arbitration, you and the Company both retain the right to pursue, in small claims court, any claim that is within that court's jurisdiction and proceeds on an individual (non-class) basis, including overdue account matters within the small claims court's jurisdiction. The Company will not demand arbitration in connection with any individual claim that you properly file and pursue in a small claims court, so long as the claim is and remains pending in that court. The following claims shall not be subject to final and binding arbitration and must be adjudicated only in the state or federal courts located in [Eden Prairie], [Minnesota], with the parties forever waiving any challenge to said court's jurisdiction and venue: (i) any dispute, controversy, or claim, including a claim for injunctive relief and damages, relating to the infringement or validity of our proprietary rights, including without limitation, trademarks, service marks, trade dress, copyrights, trade secrets, or patents, or the intellectual property rights of a third-party; or (ii) an action by the Company for temporary, preliminary, or permanent injunctive relief, whether prohibitive or mandatory, or other provisional relief, against you for breach or threatened breach of this Agreement. **You expressly agree to refrain from bringing or joining any claims that are excluded from final and binding arbitration pursuant to this subsection "h" in any representative or class-wide capacity, including but not limited to bringing or joining any claims in any class action or any class-wide arbitration.**

**i. Amendments**

Company reserves the right to amend this arbitration provision at any time. Your continued use of the Website or use or attempted use of any of the Company's products or services, is affirmation of your consent to such changes. Should the changes to this arbitration provision be material, the Company will provide you notice and an opportunity to opt-out. Your failure to opt out of material changes to this arbitration provision is affirmation of your consent to such material changes.

**SECTION 5 – INDEMNIFICATION**

To the fullest extent permitted by law, you agree to defend, indemnify, and hold harmless the Company, its directors, officers, employees, shareholders, licensors, independent contractors, subcontractors, suppliers, affiliates, parent companies, subsidiaries, and agents from and against

any and all claims, actions, losses, liabilities, damages, expenses, demands, and costs of any kind, including, but not limited to attorneys' fees and costs of any litigation or other dispute resolution, arising out of, resulting from, or in any way connected with or related to (1) your use, misuse, or attempt to use the Website, software, products, or services, (2) information you submit or transmit through the Website, (3) your breach of these Terms, the documents they incorporate by reference, the Agreement, or the representations and warranties provided by you in this Agreement, or (4) your violation of any law or the rights of a third-party.

## **SECTION 6 – NOTICE AND TAKEDOWN PROCEDURES; COPYRIGHT ACT**

If You believe that materials or content available on any Company website infringes any copyright You own, You or Your agent may send the Company a notice requesting that the Company remove the materials or content from the Company website. If You believe that someone has wrongly filed a notice of copyright infringement against You, You may send Company a counter-notice. Notices and counter-notices should be sent to [Xcel Fitness, LLC], [6585 Edenvale Blvd Suite 110], [Eden Prairie, Minnesota 55346] or at [cdfitness1@gmail.com].

## **SECTION 7 – GOVERNING LAW AND VENUE**

This Agreement and any issue or dispute arising out of or otherwise related to this Agreement or any matter concerning the Company shall be governed exclusively by the laws of the State of [Minnesota] without regard to its conflicts of laws principles. To the extent that any claim or dispute is found by the arbitrator or (if proper) a court of competent jurisdiction to be excluded from the arbitration agreement in Section 4 above, the parties agree any such claim or dispute shall be exclusively brought in and decided by the state or federal courts located in [Eden Prairie, Minnesota], and you hereby irrevocably consent to the exclusive personal jurisdiction of, and exclusive venue in, such courts, and forever waive any challenge to said courts' exclusive jurisdiction or venue. All such claims must be brought on an individual and non-class, non-representative basis, and you forever waive any right to bring such claims on a class wide or representative basis.

## **SECTION 8 – SEVERABILITY**

If any provision of this Agreement is found by the arbitrator or (if proper) a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions shall not be affected thereby and shall continue in full force and effect and such provision may be modified or severed from this Agreement to the extent necessary to make such provision enforceable and consistent with the remainder of the Agreement.

## **SECTION 9 – PRIVACY NOTICE**

This Privacy Notice is only applicable to the Website and not to any other websites that you may be able to access from the Website, which may have data collection, storage, and use practices and policies that differ materially from this Privacy Notice. When you leave the Website via a link to another website, you are subject to that site's Privacy Policy, Terms of Use, and other policies applicable to that site and you should review the Third Party website policies.

We respect your privacy and the use and protection of your non-public, personal information. The Company may collect personally identifiable information and non-personally identifiable information anytime you access or use a Company Website. The Company uses personally identifiable information to respond to your inquiries, provide you with services you have requested, keep you informed of services the Company believes may be of interest to you, and otherwise personalize your experience with the Company. The other parties with whom we share personally identifiable information may send information to you about their products or services. **The Company does not sell or lease personally identifiable information about you to others.**

If you do not want us to share your personally identifiable information with any third parties, please email us at [[cdfitness1@gmail.com](mailto:cdfitness1@gmail.com)].

If we or some or all of our assets are acquired by another company, including through a sale in connection with a bankruptcy, that company will possess the information collected by us, and it will assume the rights and obligations regarding your Personal Information as described in this Privacy Notice.

We may disclose personally identifiable information or other data to comply with the law or legal requirements, enforce or apply our Terms and other agreements, or to protect our rights, property, the safety of our users, or others. Because non-personally identifiable information does not personally identify you, the Company reserves the right to use and disclose to third parties non-personally identifiable information for any purpose.

The Company maintains reasonable physical, administrative and technical safeguards to protect personally identifiable information from loss, misuse, or unauthorized access, disclosure, alteration or destruction. No system is 100% secure however, and we cannot guarantee that all of your information will be safe 100% of the time.

The Company may collect information through cookies, web beacons, or clear Gifs about your web browsing activities such as the address of the page you are visiting, the address of the referrer page you previously visited, the time you are viewing the page, your browsing environment, and your display settings. Cookies and web beacons are small text files that are stored on your computer when you visit certain web pages. Clear Gifs are tiny graphics with a unique identifier, similar in function to cookies, used to track the online movements of Websites visitors.

**EMAIL MARKETING:** By submitting your email address through the Website, you are expressly consenting to receive emails from the Company, including from the Company's affiliates, and from third parties concerning offers and advertisements unrelated to Company. To opt-out of receiving email messages from us, from our affiliates or from other third parties, click on the "Unsubscribe" link contained in each email. Please allow up to 10 business days for us to process your request. Please note if you decide not to receive marketing emails from us, you may still receive transactional email messages regarding your order(s) (i.e., order confirmation, shipping information, etc.). If you have questions or concerns regarding this provision, please contact us at [[cdfitness1@gmail.com](mailto:cdfitness1@gmail.com)].



**YOUR CALIFORNIA PRIVACY RIGHTS:** As described in these Terms, from time to time we may make your personal information available to third parties for their marketing purposes. California law permits individuals who are California residents to request certain information about our disclosure of personal information to third parties for direct marketing purposes. If you are a California resident and would like to make such a request, please submit your request in writing to [cdfitness1@gmail.com]. If you do not want us to share your personal information with third parties, you may opt-out of this information sharing by emailing us at [cdfitness1@gmail.com]. In accordance with California Civil Code Sec. 1789.3, California resident users are entitled to know that they may file grievances and complaints with the California Department of Consumer Affairs, 1625 North Market Blvd., Suite N112, Sacramento, CA 95834; or by phone at 916-445-1254 or 800-952-5210; or by email to dca@dca.ca.gov.

### **SECTION 10 – ENTIRE AGREEMENT**

These Terms, the Agreement, and any policies or operating rules posted by us on the Website or in respect to the Website constitutes the entire agreement and understanding between and Company and governs your access and use of the Website and your use and/or attempted use of any service or product, and supersedes and replaces any prior or contemporaneous agreements, representations, communications, and proposals, whether oral or written, between you and Company. Any ambiguities in the interpretation of these Terms or the Agreement shall not be construed against the drafting party.

### **SECTION 11 – CONTACTING US**

We encourage our customers to contact us with questions or comments about our services. Please feel free to do so by sending an email to [cdfitness1@gmail.com] or calling us at [952-334-4594].

If you have any questions or inquiries concerning any of the Terms, you may contact the Company by email at [cdfitness1@gmail.com] or by regular mail at:  
[Xcel Fitness, LLC]  
[6585 Edenvale Blvd Suite 110]  
[Eden Prairie, MN 55346]