

# **ClubWorks MXM Shutdown Survey**

## **1. Contract Summary:**

This agreement is entered by ClubWorks, Inc. a Washington State Corporation with offices at 123 Ohme Garden Rd. Ste.2 Wenatchee, WA (ClubWorks) and health club operators using the MXM Shutdown Survey, (here in after The Club Owner). Under this agreement ClubWorks will provide surveys related to health club closures occasioned you the Clovid-19 pandemic and limited access to the MXM Club Owner Experience Data Platform at no charge to The Club Owner. The MXM Shutdown Survey will allow The Club Owner and our industry to better understand the impact of related shutdowns on members, and better position the Club Owner to successfully reopen at the end of the crisis. Under this agreement ClubWorks will provide SAS access to portions of the MXM Club Owner Experience Platform and standardized survey questions. The Subscriber will be responsible for selection of members receiving surveys, survey cadence, and MXM Shutdown Survey platform access at the Subscribers location/s.

To accomplish the purposes of the MXM Shutdown Survey ClubWorks Inc. and each Subscriber, (as an individual or business entity) agree as follows:

## **2. Effective Date:**

This Agreement will become effective on ClubWorks approval of the Subscribers request for access to the MXM Shutdown Survey platform and surveys

## **3. The Club Owner Warrants:**

The Club Owner warrants that they are owner/operators of a membership-based health and fitness club/s. The Club Owner also warrants that they do not work for or have a business interest in any product or business in competition with ClubWorks Inc. or Medallia Inc.

## **4. Limitations on use of the MXM Shutdown Survey Platform:**

4.1 The MXM Shutdown Survey has been developed by Club Works and Medallia Inc. and is hosted by Medallia). The a MXM Shutdown Survey gives the Club Owner access to proprietary information, processes, methods and trade secrets developed and owned by Medallia Inc. related to the capture of Club Owner experience (CX) data, processing and treatment of CX data, display of CX data, and application of CX data to club/business operations. The Club Owner agrees to use the MXM Shutdown Survey only in support of the Club Owner's club operations. The Club Owner may use ClubWorks, Inc. products for its own benefit only, and only as expressly authorized by ClubWorks, Inc. Club Owner shall not a) rent, lease, copy, provide access to or sublicense ClubWorks, Inc. Products to a third party, (b) reverse engineer, decompile, disassemble, or otherwise seek to obtain the source code to ClubWorks, Inc. Products, (c) remove or obscure any product identification, proprietary, copyright or other notices contained in ClubWorks, Inc. products (including any reports or data printed from ClubWorks, Inc. Products), or (d) publicly disseminate information or analysis regarding the performance of ClubWorks, Inc. Products, or use the MXM Shutdown Survey product or its associated data for any purpose the violates applicable State, Federal, national or international law.

The Club Owner further agrees that they will not provide copies of MXM Shutdown surveys, screenshots of the MXM Shutdown Survey platform to any competitors of ClubWorks or Medallia Inc., or allow ClubWorks or Medallia's competitors to access the MXM Shutdown Survey data platform via the Club Owner's access privileges to the MXM Shutdown Survey data platform.

### **5. Member Survey Transmittal**

The MXM Shutdown Survey puts the Club Owner in control of which members will receive surveys. The Club Owner agrees that it shall be solely responsible for (a) securing any consents that may be required from Participants to have their data gathered and processed by ClubWorks, Inc., Medallia and the MXM Shutdown Survey platform, (b) securing from Participants such permissions as may be necessary or required in order to collect, store and use such data as contemplated by this Agreement, (c) promptly communicating to ClubWorks, Inc. any "opt out" requests from Participants to no longer receive solicitations for feedback, and (d) providing for use of Participant data in its privacy and data use policies consistent with the relationship contemplated by this Agreement.

### **6. Ownership, Use and Protection of Data**

6.1 The Club Owner will own all unformatted, unprocessed member survey scores and unstructured commentary derived from MXM Shutdown Surveys. ClubWorks, Inc. owns the Covid-19 Shutdown Survey Forms and is hereby given license to use member responses to surveys for the purpose of delivering the MXM Shutdown Survey product.

6.2 ClubWorks, Inc. will own the output of the Club Owner's member responses as applied to the MXM Shutdown Survey data platform, subject to the limitation that ClubWorks may not use/disclose the Club Owner's MXM Shutdown Survey product content related to one or more Club Owner facilities to any third party in any way that discloses the Club Owner's MXM Shutdown Survey information in a form that identifies the Club Owner, the Club Owner's employees, Club Owner's members, any surveyed club's address or reasonable market area. This limitation on disclosure shall not apply to information in the public domain, prior to disclosure.

6.3 Protection of Club Owner Data held by ClubWorks, Inc.: ClubWorks, Inc. will meet Statutory requirements for the protection of MXM Shutdown Survey data from accidental or unauthorized disclosure to third parties.

### **7 System Access and Termination**

MXM Shutdown Survey is delivered to the Club Owner at no cost. Accordingly, ClubWorks may in the exercise of its sole and absolute discretion determine :a) whether a given Club Owner will be allowed access to the MXM Shutdown Survey product; b) when an individual Club Owner's access to the system is terminated and c) when the MXM Shutdown Survey product itself will be withdrawn from operation. Termination of individual Club Owners access to the MXM Shutdown Survey product or the MXM Shutdown Survey itself will be preceded by email notification to Club Owners at least 72 hours prior to termination of access or product shutdown

The Club Owner may terminate his use of the MXM Shutdown Survey at anytime

### **8. Warranty Limitations**

8.1 EXCEPT AS OTHERWISE STATED HEREIN, NEITHER PARTY SHALL BE LIABLE FOR LOSS OF USE, LOST DATA, FAILURE OF SECURITY MECHANISMS, INTERRUPTION OF BUSINESS, OR ANY INDIRECT, SPECIAL, INCIDENTAL, RELIANCE OR CONSEQUENTIAL DAMAGES OF ANY KIND (INCLUDING LOST PROFITS), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, EVEN IF INFORMED OF THE POSSIBILITY OF SUCH DAMAGES IN ADVANCE. THIS SECTION 10.1 SHALL NOT APPLY TO CLUB OWNER WITH RESPECT TO ANY CLAIM ARISING UNDER SECTIONS 5. (Club Owner Provided Information and indemnification.

8.2. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, CLUBWORKS, INC. ENTIRE LIABILITY RELATING TO THE SUBJECT MATTER OF THIS AGREEMENT SHALL NOT EXCEED THE AMOUNT ACTUALLY PAID BY CLUB OWNER TO CLUBWORKS, INC. UNDER THIS AGREEMENT.

8.3. The parties agree that the limitations specified in this Section 10 will survive and apply even if any limited remedy specified in this Agreement is found to have failed of its essential purpose.

## **9 Limited Warranty**

**9.1 ClubWorks, Inc. warrants, for Club Owner's benefit only, that ClubWorks, Inc. will comply with relevant laws and regulations regarding the access to, and storage of, Club Owner's members/client private information.** ClubWorks, Inc. does not warrant that the operation of ClubWorks, Inc. Products will be uninterrupted or error-free.

9.2. Warranty Disclaimer. EXCEPT FOR THE LIMITED WARRANTY IN SECTION 11.1, AND TO THE EXTENT PERMITTED BY APPLICABLE LAW, CLUBWORKS, INC. PRODUCTS AND ALL SERVICES ARE PROVIDED "AS IS" AND WITH ALL FAULTS. CLUBWORKS, INC. AND MEDALLIA: (I) DO NOT REPRESENT OR WARRANT THAT THE (A) CLUBWORKS, INC. PRODUCTS WILL BE SECURE, TIMELY, UNINTERRUPTED OR ERROR FREE, (B) ANY CLUB OWNER CONTENT, CLUBWORKS, INC. PRODUCTS DATA, OR OTHER STORED DATA WILL BE ACCURATE, OR NON-CORRUPTED, OR (C) THAT CLUBWORKS, INC. PRODUCTS WILL BE FREE OF ANY VIRUSES OR MALICIOUS CODE WHICH CANNOT BE DETECTED USING COMMERCIALY AVAILABLE PRODUCTS AND (II) SPECIFICALLY DISCLAIM ANY AND ALL OTHER WARRANTIES, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO CLUBWORKS, INC. PRODUCTS. CLUBWORKS, INC. PRODUCTS DATA, OR OTHER STORED DATA AND ANY RELATED SERVICES, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF NON-INFRINGEMENT,

MERCHANTABILITY, TITLE AND FITNESS FOR A PARTICULAR PURPOSE, REGARDLESS OF ANY KNOWLEDGE OF CLUB OWNER'S PARTICULAR NEEDS. CLUB OWNER MAY HAVE OTHER STATUTORY RIGHTS. HOWEVER, TO THE FULL EXTENT PERMITTED BY LAW, THE DURATION OF STATUTORILY REQUIRED WARRANTIES, IF ANY, SHALL BE LIMITED TO THE LIMITED WARRANTY PERIOD.

NEITHER CLUBWORKS, INC. NOR MEDALLIA SHALL BE LIABLE FOR DELAYS, INTERRUPTIONS, SERVICE FAILURES AND OTHER PROBLEMS INHERENT IN USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS OR OTHER SYSTEMS OUTSIDE THE REASONABLE CONTROL OF CLUBWORKS, INC., EXCEPT AS OTHERWISE STATED HEREIN.

CLUBWORKS, INC. AND MEDALLIA MAKE NO REPRESENTATIONS OR WARRANTIES AS TO THE STATISTICAL SIGNIFICANCE OF CLUBWORKS, INC. PRODUCTS DATA OR ANY OTHER INFORMATION PROVIDED BY OR DERIVED FROM CLUBWORKS, INC. PRODUCTS OR THE SUITABILITY OF THIS DATA FOR USE IN ANY WAY, INCLUDING WITHOUT LIMITATION, TO MAKE BUSINESS, ECONOMIC, EMPLOYMENT, FRANCHISE OR

PROMOTIONAL DECISIONS. IT IS CLUB OWNER'S SOLE RESPONSIBILITY TO DETERMINE THE SUITABILITY OF THE CLUBWORKS, INC. PRODUCTS DATA FOR ALL USES.

## **10. Indemnification.**

10.1 Intellectual Property. ClubWorks, Inc. shall indemnify and hold harmless Club Owner from and against any claim of infringement of a U.S. patent, U.S. copyright, or U.S. trademark asserted against Club Owner by a third party based upon Club Owner's authorized use of ClubWorks, Inc. Products, provided that ClubWorks, Inc. shall have received from Club Owner: (i) prompt written notice of such claim; (ii) the exclusive right to control and direct the investigation, defense, or settlement of such claim; and (iii) all reasonable necessary cooperation of Club Owner. If Club Owner's use of any of ClubWorks, Inc. Product is, or in ClubWorks, Inc. opinion is likely to be, enjoined due to the type of infringement specified above. The foregoing indemnification obligation of ClubWorks, Inc. shall not apply: (1) if a ClubWorks, Inc. Product is modified by any party other than ClubWorks, Inc., but solely to the extent the alleged infringement is caused by such modification; (2) a ClubWorks, Inc. Product is combined with other non-ClubWorks, Inc. products or processes not authorized by ClubWorks, Inc., but solely to the extent the alleged infringement is caused by such combination; (3) to any unauthorized use of ClubWorks, Inc. Products; (4) to the Club Owner Content or any third-party deliverables or components contained within ClubWorks, Inc. Products; or (5) to any action arising as a result of the Club Owner Content. THIS SECTION 12 SETS FORTH CLUBWORKS, INC.'S SOLE LIABILITY AND CLUB OWNER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO ANY CLAIM OF INTELLECTUAL PROPERTY INFRINGEMENT.

10.2 Compliance with data privacy laws. ClubWorks Inc. will indemnify the Club Owner against 3<sup>rd</sup> party Claims brought by the Club Owner's members/Clients based upon a failure of ClubWorks to comply with relevant laws and regulation regarding the access and storage of private information related to the MXM Shutdown Survey stored by ClubWorks or Medallia.

10.3 The Club Owner will indemnify and hold harmless ClubWorks against all claims of third parties relative to a) the Club Owner's improper use of the MXM Shutdown Survey product, b) delivery of Surveys to Club Members or other parties or c) disclosure of private or personal information associated with the MXM Shutdown Surveys by the Club Owner.

## **11. General Terms**

11.1. Severability. If any provision of this Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid that provision shall be limited to the minimum extent necessary so that this Agreement shall otherwise remain in effect.

11.2. Governing Law; Jurisdiction and Venue. Unless waived by ClubWorks, Inc. in its sole discretion, the jurisdiction and venue for actions related to the subject matter hereof shall be Washington state and United States federal courts located in Santa Clara County, California and both parties hereby submit to the personal jurisdiction of such courts.

11.3. Attorneys' Fees and Costs. The prevailing party in any action to enforce this Agreement will be entitled to recover its attorneys' fees and costs in connection with such action.

11.5. Amendments; Waivers. No supplement, modification, or amendment of this Agreement shall be binding, unless executed in writing by a duly authorized representative of each party to this Agreement.

11.6. Entire Agreement. This Agreement is the complete and exclusive statement of the mutual understanding of the parties.

11.8. Statistical Information. Notwithstanding anything else in the Agreement or otherwise, ClubWorks, Inc. and Medallia may monitor Club Owner's use of the system and use data in an aggregate and anonymous manner, compile statistical and performance information related to the provision and operation of the system, and may make such information publicly available, provided that such information does not identify Club Owner or Club Owner's Confidential Information or any personally identifiable information.

11.9. Subcontractors. ClubWorks, Inc. may use the services of subcontractors for performance of services under this Agreement. B Works Products as required under this Agreement.

11.10. Compliance with Laws. Club Owner will comply, at Club Owner's expense, with all statutes, regulations, rules and ordinances of any governmental body, department or agency, which apply to or result from Club Owner's obligations under this Agreement. Club Owner agrees not to export ClubWorks, Inc. Products directly or indirectly, separately or as part of a system, without first obtaining proper authority to do so from the appropriate governmental agencies or entities, as may be required by law.

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