

# SmartAuction Terms of Use Agreement

## (Updated November 1, 2011)

- I. Applicability and Acceptance of Terms of Use. This SmartAuction Terms of Use Agreement (“Terms of Use”) governs the terms and conditions of use for Internet-based vehicle auctions (individually and collectively “Auction”) hosted by GMAC (“SmartAuction”). By clicking on the “I Accept” button at the end of this Terms of Use, the Auction user (“User”) agrees to the terms and conditions described below. User may contact SmartAuction at 877-273-5572 with any questions regarding the Auction.
- II. Eligibility.
- A. The Auction is available to commercial users, approved by SmartAuction.
  - B. User must not allow any retail customer to access, use, or attempt to purchase or sell any vehicles through the Auction.
  - C. User must comply with all applicable legal requirements in the jurisdiction(s) in which it is located and conducts business, including, without limitation, maintaining good standing as a legally organized entity and all necessary licenses, permits, and other required authorizations for the conduct of its business as related to this Terms of Use Agreement. Any vehicle acquired in violation of any legal requirement may not be returned or arbitrated for any reason, notwithstanding any contrary provision in the Terms of Use.
  - D. Each vehicle posted to the Auction must meet all applicable legal standards, including, without limitation, those issued by the United States Department of Transportation and the United States Environmental Protection Agency.
  - E. SmartAuction reserves the right to do any of the following, in its sole discretion:
    - 1. Deny access to the Auction to anyone for any reason not inconsistent with applicable law and without advance notice;
    - 2. Limit the number of vehicles User can acquire on the Auction;
    - 3. Limit the amount of money User owes to SmartAuction for any one day’s Auction activities;
    - 4. Implement cross-line buying rules (i.e. manufacturer's restrictions, based on model-year and/or mileage, on selling particular vehicles to non-franchised Users) to certain vehicles on the Auction.
- III. Payment of Purchase Price and Fees.
- A. Any User that acquires a vehicle through the Auction (“Buyer”) must pay the following (collectively “Purchase Price”):
    - 1. The full purchase price of the acquired vehicle;
    - 2. A service fee on the acquired vehicle in the amount stated on the Auction’s “Dealer Profile” page as of day of vehicle purchase, which includes costs and expenses for: preparation and exhibition of the vehicle, payment processing, title administration, transportation of the vehicle to User’s designated destination, account adjustment including interface with Buyer’s vehicle finance source (“Financier”), if any, and service and inspection facilities (“Service Fee”);

3. All applicable taxes and title and license fees for any vehicle purchased through the Auction.
- B. At any time, including, without limitation, the time of payment, SmartAuction may, in its sole discretion add, delete, or change some or all of the fees and/or change the time of payment.
- C. Buyer must pay the full Purchase Price of each vehicle acquired through the Auction at time of purchase in immediately available good funds via any of the following payment mechanisms as mutually agreed by Buyer and SmartAuction:
  1. Electronic payment transaction initiated by SmartAuction in accordance with Buyer's SmartAuction Authorization to Withdraw and Deposit Funds via Commercial Bank Automated Clearing House Transactions;
  2. Arrangement with Buyer's Financier whereby SmartAuction receives payment from the Financier directly (e.g., SmartAuction drafts on the Financier); or
  3. Arrangement with an approved financing source listed on the Auction website.
- D. Any User selling or attempting to sell a vehicle through the Auction, whether for itself or on behalf of another, (in each case, "Seller") must pay to SmartAuction:
  1. A sale fee for each vehicle sold in the amount established by SmartAuction from time to time as posted on the Seller's "Dealer Profile" screen of the Auction.
  2. \$500 – each time a bid is awarded to a Buyer for a vehicle posted by Seller, but the Seller does not make the vehicle available for pickup by the Buyer for any reason (e.g., Seller has already sold the vehicle).

#### IV. Tax Exemption Certificate Statement and Tax Notification.

##### A. User certifies that:

1. Any vehicles(s) purchased on the Auction are for resale purposes only; and
2. User holds a retail sales tax registration certificate, license, or other permit issued by the sales tax authority of the state(s) where User is physically located and/or conducts business.

- B. If any vehicle purchased through the Auction is used for any purpose other than for resale, Buyer must pay any and all related sales or use taxes directly to the proper taxing authorities.

#### V. Vehicle Purchase and Sale.

##### A. Auction Process:

1. The "Search" feature of the Auction lists vehicles currently being offered for purchase through the Auction.
  - a. SmartAuction does not guaranty that vehicles listed in the "Search" feature will be available for purchase at the time User places a bid.
  - b. Vehicles may be unavailable for various reasons including, without limitation, a contractual right of a retail customer to purchase the Vehicles at contract maturity, or a Vehicle may have been stolen, damaged, destroyed, lost, confiscated, redeemed or inadvertently sold.
  - c. Before making arrangements to take possession of a Vehicle purchased on Auction, Buyer must call Vehicle storage location to confirm present availability.
2. The following designations for listed vehicles have the meanings ascribed to them below:

- a. "Buy It Now" is the price at which User can automatically purchase the vehicle without bidding. Once the "Buy It Now" option on a particular vehicle is selected and confirmed by SmartAuction, all bidding on that vehicle will be closed.
  - b. A yellow-light icon appended to a vehicle listing indicates a "Yellow Light Sale" vehicle, which is a vehicle offered subject to a specific, posted, cautionary condition or conditions, which may include, without limitation, delayed title delivery, Canadian title, true mileage unknown, salvage title, repossession title or affidavit, fire, flood or frame/unibody damage.
  - c. A red-light icon appended to a vehicle listing indicates a "Red Light Sale" vehicle, which is a vehicle offered on a "Final Sale" basis and cannot be arbitrated or returned, except as provided in Section VIII.
3. The Auction begins at the time posted on the Auction's Home Screen.
    - a. Each day the Auction is open, the Home Screen will have the Auction schedule for that day.
    - b. User may preview vehicles for the upcoming Auction anytime before the start of the bidding on the vehicle.
    - c. Once the bidding on a vehicle starts, User may enter bids into the Auction until the time specified for the close of bidding (due to possible delays in data transmissions through the Internet, before a bid is submitted the "Bid List" screen should be refreshed to ensure viewing the most current bid.).
      - i. All bids are subject to a minimum bid, as posted with each vehicle, and minimum bid increments of \$100.00.
      - ii. If User places a bid that is between bid increments, User's bid will not be accepted and will not be processed.
    - d. A bid is valid and effective only after SmartAuction's computer system has processed it.
    - e. SmartAuction reserves the right to reject or void any bid, whether successful or not, that it deems in its sole discretion not to have been made in good faith or which is restricted or otherwise prohibited under the Terms of Use.
    - f. Any party selling a vehicle on the Auction is prohibited from bidding on such vehicle, either directly or indirectly through an agent, representative, or designee.
  4. When the Auction closes, the highest bidder wins the vehicle at its winning bid amount.
    - a. Bids are first ranked by price.
    - b. If bids are for the same price, then earlier bids take precedence over later bids.
    - c. Immediately upon notification by SmartAuction of its winning bid, User is obligated to complete the transaction and pay the Purchase Price.
    - d. At the end of each Auction period, a summary of User's successful bids will be available in the "Auction Summary" section of the Auction.
  5. A vehicle authorization report is available on the Auction and is the official documentation required to have the vehicle released from the designated storage location to the transport company or dealership personnel taking delivery of the vehicle.
  6. SmartAuction may impose rules or limits on the bidding process, including as to the timing of bids.

**B. Make an Offer Process:**

1. A Seller may elect to accept offers from Users on any vehicle the Seller posted on the Auction that has a green "Make Offer" icon appended to it.
2. The Seller will set the minimum opening offering price for an offered vehicle based on the opening live auction bid price for that vehicle.

3. Any offer that has not been accepted by the Seller, expires one hour before the end of the live auction for the applicable vehicle, or, in any event, upon cancellation under Section V.B.7 below or upon withdrawal under Section V.B.8 below.
4. Any offer that the Seller declines expires at the time it is declined.
5. The Seller may elect to receive offers directly via e-mail, but must accept or decline offers through the “Accept/Decline Offers” screen, which is accessible from the “Active Vehicles” screen.
6. The Seller may choose to decline a submitted offer, lower the affected vehicle’s opening price, and accept further offers on the affected vehicle.
7. An offer on a vehicle is automatically cancelled upon any of the following events:
  - a. A bid is placed on the vehicle during a live auction.
  - b. The Seller removes the vehicle from the Auction.
  - c. The Seller places a hold on the vehicle.
  - d. The Seller changes any information about the vehicle, e.g., price, location, vehicle options, etc.
  - e. The vehicle is sold through the “Buy It Now” feature of the Auction.
  - f. The Seller accepts another offer on the vehicle.
8. A submitted offer may be withdrawn by the User at anytime, as long as the offer has not already been accepted or declined by the Seller.
9. Offers are treated as bids on the applicable vehicle, and each offer, and any purchase of the applicable vehicle, are deemed to have occurred through the Auction and are subject to the Terms of Use as though they occurred as part of a live auction.

C. Seller Vehicle Disclosure Requirements, Representations, and Warranties:

1. The Seller must fully and accurately disclose the following for each vehicle sold through the Auction:
  - a. Any vehicle defects and/or damage.
  - b. Any prior repairs to the vehicle.
  - c. Any mechanical defect.
  - d. Any missing equipment.
  - e. Any structural damage, including cosmetic frame/unibody damage.
  - f. Tires tread at the shallowest point.
  - g. Any aftermarket alterations.
  - h. Any modifications to the vehicle from the original build, including any logo or decal misrepresentations.
  - i. Whether any original factory warranty for the vehicle is not in effect for any reason other than time or mileage expiration.
2. The Seller represents and warrants that:
  - a. It has good and marketable title to, or is otherwise authorized to sell, each vehicle that it posts to the Auction.
  - b. Any vehicle that it posts to the Auction as part of the Auction’s “Ready4Retail” program, or any other “Certified” program of any manufacturer, meets the minimum standards of such programs.

- c. The indicated storing location of each vehicle that it posts to the Auction is accurate, and it will reimburse the Buyer for any and all reasonable expenses incurred by Buyer while attempting to pick-up vehicles with an inaccurate storing location.

#### VI. Ownership and Title Distribution.

- A. Legal ownership of a purchased vehicle, and risk of loss for the vehicle, passes to Buyer, once SmartAuction sends Buyer notice of its winning bid, notwithstanding anything to the contrary in this Terms of Use.
  1. Buyer must verify with its Financier whether a vehicle is eligible for financing.
  2. Absent exceptional circumstances as determined by SmartAuction in its sole discretion, SmartAuction will not buy back or unwind any vehicle purchase, because Buyer's Financier declines to finance the purchase.
- B. Upon Buyer's purchase of a vehicle through the Auction, either SmartAuction (if it is the vehicle owner) or the Seller, as applicable, will begin the process of transferring the title to the Buyer.
  1. Seller must deliver title in a timely manner to Buyer or Buyer's Financier.
  2. Buyer, or its Financier, as applicable, must notify SmartAuction, if the title is not received within 10 business days following the day after the vehicle purchase date on the Auction, or within the time period indicated in the vehicle posting.
  3. If Buyer notifies SmartAuction that it has not received the vehicle title in accordance with Section VI.B.2 above, then SmartAuction will notify Seller and Seller must produce the title of the sold vehicle to the Buyer within a time frame determined by SmartAuction. In the event of a buyback due to non-delivery of a marketable title, Seller will be responsible for any reasonable expenses as determined by SmartAuction (e.g. reconditioning, repairs) that have been incurred by the Buyer.
  4. SmartAuction reserves the right to remediate clerical or coding title errors within a reasonable time after receiving notice to have errors corrected.
  5. Seller is responsible for any and all reasonable costs and expenses (as determined by SmartAuction in its discretion) that may be incurred by SmartAuction or Buyer in attempting to retrieve a corrected and/or undelivered vehicle title.

#### VII. Vehicle Pick-Up.

- A. Buyer is responsible for vehicle pick-up and related costs and must take physical possession of each vehicle acquired through the Auction within 5 business days beginning with the first business day after the purchase date, unless the vehicle qualifies for arbitration and SmartAuction approves the vehicle for arbitration.
- B. The Seller may charge Buyer reasonable storage fees and/or arrange delivery of the Vehicle to the Buyer at the Buyer's expense if Buyer does not pick up purchased Vehicles promptly.
- C. Buyers are encouraged to contact storage location to arrange vehicle pick-up to verify location and availability of vehicle.
- D. SmartAuction may suspend User's Auction privileges or rescind a vehicle sale for failure to promptly take physical possession of the purchased vehicle.

- E. SmartAuction reserves the right to charge Buyer reasonable storage fees and/or arrange delivery of the purchased vehicle to Buyer at Buyer's expense.
- F. If a purchased vehicle is not available at time of pickup, User must immediately notify SmartAuction at telephone number 877-273-5572 that the purchased vehicle is not at the physical location as printed on the Auction Authorization form.

### VIII. Arbitration.

#### A. Vehicle Arbitration – General:

- 1. Buyer may arbitrate a vehicle purchased through the Auction only in accordance with this Terms of Use.
- 2. This Terms of Use provides Buyer's sole remedies for any dispute regarding a vehicle purchased through the Auction.
- 3. Buyer must initiate any vehicle arbitration within 10 business days beginning the day after the purchase date as outlined in Section VIII.B below.
- 4. Buyer has full responsibility for the vehicle being arbitrated and any expenses related to the vehicle, unless and until SmartAuction formally approves vehicle buyback under the terms of this Section VIII *and* the buyback transaction is fully consummated.
- 5. A vehicle purchased through the Auction may be arbitrated only once for any mechanical, electrical, or undisclosed damages, and once a vehicle is arbitrated for any one or more of these reasons, further arbitration of the vehicle based on any of these reasons arbitration is not available for that vehicle.
- 6. Buyer may seek to arbitrate a vehicle purchased through the Auction for the following reasons only, and only if the vehicle is less than 20 model years and less than 10 model years for trailers, recreational vehicles, or watercraft:
  - a. For vehicles other than Red Light Sale vehicles:
    - i. If there is a material deviation in the vehicle description provided on the Auction and the vehicle at the time of purchase (e.g., different model or engine than disclosed at the time of purchase).
    - ii. If it appears that the vehicle's odometer has been altered or disabled from functioning in any way.
    - iii. If there is an undisclosed adverse condition affecting the value of the vehicle by more than \$500, including, without limitation, undisclosed prior repairs.
    - iv. If there is undisclosed cumulative visual damage to the vehicle that is greater than \$500 and/or any single instance of visual damage that is greater than \$250 (as determined by SmartAuction).
    - v. If there is undisclosed cumulative mechanical repairs to the vehicle that is greater than \$500 and/or any single instance of mechanical repairs that is greater than \$250 (as determined by SmartAuction).
    - vi. If differences in disclosed tire tread measurements greater than 2/32nds of an inch, which will be arbitrated at a depreciated value based on the tread depth disclosed;
    - vii. If there is undisclosed missing equipment with a cumulative wholesale value greater of \$150 or more (as determined by SmartAuction).
    - viii. If the vehicle was listed by the Seller as eligible for the Auction's "Ready4Retail" program, or any other "Certified" program of another manufacturer, but the vehicle does not meet one or more of the requirements for such program.

- ix. If title for the arbitrated vehicle was not delivered within a timely manner from the purchase date on the Auction, including, without limitation, within a specified timeframe as posted on the Auction.
- x. If the vehicle is not present at the sale location indicated on SmartAuction.
- xi. If the vehicle title is not marketable or otherwise clear and free of any undisclosed brands.
- xii. If outstanding fees of greater than \$100 are owed in connection with the vehicle, for example, license plate fees owed to the department of motor vehicles.
- xiii. If the Seller did not disclose that the original factory warranty for the vehicle is no longer in effect for any reason other than time or mileage expiration.
- b. For Red Light Sale vehicles:
  - i. If the vehicle has undisclosed fire, flood, frame/unibody damage.
  - ii. If it appears at the time of purchase that the odometer has been altered or disabled from functioning in any way.
  - iii. If there is a material deviation between the vehicle based on the description provided on the Auction and the vehicle at the time of purchase, including, without limitation, if the description was misleading due to material misrepresentation, or material omission, of information.
  - iv. If title for the arbitrated vehicle was not delivered within a timely manner from the purchase date on the Auction, including, without limitation, within the specified timeframe as posted on the Auction.
  - v. If the vehicle was not present at the sale location indicated on SmartAuction.
  - vi. If the vehicle title is not clear and free of any undisclosed brands.
  - vii. If outstanding fees of greater than \$100 are owed in connection with the vehicle, for example, license plate fees owed to the department of motor vehicles.

NOTE: Red Light Sale vehicles may not be arbitrated for any reason other than those listed in subsection VIII.A.6.b above.

- 7. A purchased vehicle may not be arbitrated based solely on information, data, errors, or omissions contained in such history reports.
- 8. Buyer may not seek to arbitrate a vehicle purchased through the Auction for routine maintenance issues, including, without limitation, brake repair, air conditioning recharge, tune-ups, shocks & struts, and/or oil changes.
- 9. Buyer must not use, repair or modify any vehicle purchased through the Auction that it wants to arbitrate and must use reasonable care to maintain the vehicle in substantially the same condition it was in at the time of purchase. If either of these requirements is not met, then the vehicle may not be arbitrated.
- 10. In its sole discretion, SmartAuction may assess a charge for excessive mileage on a Buyback Vehicle (defined below) that has been driven after purchase.
- 11. Kit vehicles or homemade vehicles are sold “as-is” and cannot be arbitrated for any reason.
- 12. Any vehicle that was manufactured for use in a foreign country, or that has been registered in a foreign country, including Canada, (i.e., so-called gray market vehicles) must be disclosed as such and must meet all other eligibility standards listed in the Terms of Use.
- 13. Reimbursement of any kind, including, without limitation, the purchase price, service fee, and transportation costs will not be payable or paid until verification of returned title is provided by or to SmartAuction or the Seller. For verification, the vehicle title must be sent with

tracking or delivery confirmation to the Seller or to the following address for GM or GMAC units:

For delivery via the United States Postal Service (USPS), the title must be sent to:  
Attn: SmartAuction  
PO Box 295373  
Lewisville, Texas 75029

For any other delivery (e.g., via FedEx, UPS, etc...), the title must be sent to:  
Attn: SmartAuction  
2911 Lake Vista Drive 2W  
Lewisville, Texas 75067

**B. Vehicle Arbitration Process:**

1. Buyer must initiate any vehicle arbitration within 10 business days beginning the day after the vehicle purchase date; however, this 10 business day limitation does not apply to arbitrations based on undisclosed odometer discrepancies or branded titles.
2. For any vehicle sold through the Auction, Buyer must notify SmartAuction (online via the "Arbitration Request" screen or at telephone number 877-273-5572) of Buyer's intent to arbitrate the vehicle.
  - a. Buyer will submit the dispute to SmartAuction for a final decision that binds both the Buyer and the Seller.
  - b. SmartAuction will grant any remedy that it deems appropriate under the circumstances.
  - c. Any remedy granted by SmartAuction in favor of Buyer is conditioned on Buyer's return of the title paperwork of the vehicle at issue to SmartAuction or the Seller, if applicable and as directed by SmartAuction.
3. If additional information is requested by SmartAuction, Buyer must submit all requested information to SmartAuction at e-mail address [sasales.support@ally.com](mailto:sasales.support@ally.com) within 2 business days of the request.
  - a. If Buyer does not provide the requested information within 2 business days, then SmartAuction may deny the arbitration and terminate the arbitration process, in its discretion.
  - b. If Buyer cannot e-mail this information to SmartAuction, Buyer will so inform the SmartAuction representative requesting the information to determine another mutually acceptable form of transmission.

**C. Arbitration Vehicle Policy on Shipping Costs and Transportation Responsibilities:**

1. For each vehicle arbitrated in accordance with this Section VIII resulting in a reversal of the vehicle purchase transaction ("Buyback Vehicle"):
  - a. The Seller is responsible for picking up and transporting the vehicle back to its location of choice, at no cost to Buyer.
  - b. Seller must reimburse Buyer for reasonable vehicle transportation costs (as determined by SmartAuction) that Buyer actually incurred in connection with taking delivery, or attempting to take delivery, of the Buyback Vehicle after purchasing it, if the Buyback Vehicle was arbitrated for any of the following reasons: the vehicle title is not delivered within a timely manner from the purchase date on the auction; if the vehicle title is not marketable or otherwise clear and free of any undisclosed brands; vehicle was incorrectly listed by the Seller as eligible for the Auction's "Ready4Retail" program, or any other "Certified" program of another manufacturer; undisclosed fire damage; undisclosed frame/unibody damage; undisclosed flood damage; odometer tampering; material

deviation between the vehicle description provided on the Auction and the vehicle at the time of purchase (e.g., different model or engine than disclosed at the time of purchase); or uncompleted sale (Vehicle unavailable for pick-up after purchased by Buyer).

- i. Any such reimbursement is conditioned on User providing SmartAuction with a copy of the invoice for such transportation costs within 10 business days from the date that SmartAuction determined the vehicle was to be a Buyback Vehicle.
  - ii. The invoice must include acknowledgment of drop off/receipt by the transporter showing the specific vehicle identification number of the vehicle involved.
- c. If the Buyback Vehicle was arbitrated for any reason other than those stated in Section VIII.C.1.b above, SmartAuction will reimburse Buyer for reasonable (as determined by SmartAuction) vehicle transportation costs (excluding air travel, meals, lodging, etc.) that Buyer actually incurred in connection with taking delivery of the vehicle after purchasing it.
- i. Any such reimbursement is conditioned on User providing SmartAuction with a copy of the invoice for such transportation costs within 10 business days from the date that SmartAuction determined the vehicle was to be a Buyback Vehicle.
  - ii. The invoice must include acknowledgment of drop off/receipt by the transporter showing the specific vehicle identification number of the vehicle involved.
  - iii. SmartAuction, in its sole discretion, reserves that right to deny reimbursement of transportation costs upon a determination that this feature is being abused.

#### IX. Miscellaneous.

##### A. Business Days:

As used in this Terms of Use, “business days” means weekdays, excluding Auction holidays, as listed under the “Featured Contents” section of the Auction’s “Home Screen”, as of the day of vehicle purchase.

##### B. Termination:

SmartAuction reserves the right, at its sole discretion, to terminate the Auction at any time and without prior notice.

##### C. System Integrity; Confidentiality of User Login Identification and Password:

1. User may not:
  - a. Use any device, software, unauthorized human intervention, or other means to interfere or attempt to interfere with the proper working of the Auction; or
  - b. Take any action that imposes an unreasonable or disproportionately large load on the Auction’s or SmartAuction’s infrastructure.
2. User is solely responsible for any authorized or unauthorized use of User’s Auction login identification or password and may not improperly use, disclose, or share its login identification or password to any third party.

##### D. External Forces and Force Majeure:

1. SmartAuction is not responsible for interruption of any availability of the Auction, and SmartAuction has no liability, (including, without limitation, direct, indirect, consequential, special, exemplary, incidental or otherwise), for any failure of Auction to perform in any way, to the extent that any such failure results from factors or external forces outside of its control, including, without limitation, Internet traffic, system failure, and third-party service failure.
2. Neither User nor SmartAuction is liable to the other for a delay in performance or failure to perform any obligation under this Agreement to the extent such delay is due to causes beyond

its control including, without limitation, natural disasters, governmental regulations or orders, civil disturbance, war conditions, acts of terrorism or strikes, lock-outs or other labor disputes, and is without its fault or negligence (“Force Majeure Condition”). The performance of any obligation suspended due to a Force Majeure Condition will resume as soon as reasonably possible as and when the Force Majeure Condition subsides.

E. No Warranties:

1. SmartAuction provides the Auction on an “as is” basis and without any warranty or condition, expressed or implied.
  - a. SmartAuction specifically disclaims all implied warranties of title, merchantability, and fitness for a particular purpose, in each case of the Auction and the Vehicles listed on the Auction.
  - b. SmartAuction is solely the host of the Auction and is not involved in the actual transaction between User and vehicle owners other than as to vehicles owned by GMAC.
  - c. SmartAuction does not warrant any vehicle information or any vehicle condition.
2. SmartAuction makes no representations or warranties about the accuracy or completeness of the information contained in electronic data vehicle histories (including, without limitation, AutoCheck and CarFax history reports).
3. This Terms of Use is not, and will not be interpreted to create, a guaranty or warranty of continuous, timely, secure, or error free operation of the Auction.
4. SmartAuction does not in any way warrant the results that may be obtained from the use of the Auction or the accuracy or reliability of any information obtained through the Auction.
5. Except for Vehicles owned by GMAC:
  - a. SmartAuction is not responsible for the contents of any vehicle postings or any “comments” accompanying such postings;
  - b. Any incentives, promotions, or gifts offered to User, with or without SmartAuction's consent, by the Seller of vehicles sold through SmartAuction are the sole responsibility of such Sellers.
6. SmartAuction makes no representation or warranty regarding a manufacturer’s vehicle certification program (e.g., “Certified Used”) or the “Ready4Retail” program, including, without limitation, whether a vehicle sold through the Auction remains eligible for any such program.

F. Vehicles Subject to Open Recall:

To the extent a vehicle is the subject of any recall campaigns initiated by the manufacturer (“Recall”):

1. User will repair any vehicle it purchases through the Auction in accordance with any manufacturer-issued service bulletin related to a Recall before such vehicle is resold, redelivered, or operated, regardless of whether any or all Recall campaigns are disclosed to User through the Auction.
2. User will indemnify and hold harmless any Seller and any of the Seller’s employees and representatives for any loss or damage that occurs as a result of the failure to effectuate any Recall repairs.
3. SmartAuction bears no responsibility for any Seller’s failure to effectuate the Recall repairs before or after posting the subject vehicle for sale through the Auction.

G. Indemnification:

User will indemnify SmartAuction, its owners, employees, agents, and representatives from any and all claims, demands, damages (including actual, compensatory, special, incidental, or consequential damages), costs, expenses, suits and liabilities, including, without limitation, the payment of reasonable attorneys' fees, arising out of or related to its use of or participation in the Auction, including, without limitation, any claims arising from or related to User's sale of on the Auction of vehicles it owns or is selling on another's behalf.

H. Limit of Liability:

In no event is SmartAuction liable to User for:

1. Lost profits or any special, exemplary, incidental, or consequential damages of any type or nature whatsoever, arising out of or in connection with the Auction.
2. For any acts or omissions of any vehicle transporter.

I. Terms of Use Modifications:

1. This Terms of Use supersedes any prior or conflicting version of it and any other agreement between User and SmartAuction that specifically covers its subject matter.
2. From time to time, and in its sole discretion, SmartAuction may modify the Terms of Use with or without any advance notice to User by posting the changes on the Auction or substituting a new terms of use agreement in place of the current one.

J. No Waiver of Rights or Remedies:

Any forbearance, delay, or failure by SmartAuction in strictly enforcing any requirement of this Terms of Use, or otherwise exercising any right or remedy, does not constitute a waiver of any such requirement, right, or remedy or of any existing or future breach by User.

K. Cumulative Remedies:

SmartAuction's rights and remedies under, and/or in connection with, the Terms of Use are cumulative and may be exercised singly, concurrently, and/or successively in its sole, absolute discretion.

L. Intellectual Property:

All text, images, graphics, videos and other materials on this website ("Intellectual Property") are subject to the copyright and other intellectual property rights of GMAC, its affiliates, or its licensors.

1. The Intellectual Property may not be reproduced, distributed, or modified without the express written permission of GMAC.
2. The marks appearing on the Auction, including, without limitation, "GMAC" and "SmartAuction" and their respective logos, emblems, and slogans, are trademarks or service marks of GMAC, its affiliates, or licensors, and may not be used without the express written permission of GMAC, its affiliates, or licensors, as applicable.
3. This section IX.L.3 applies to vehicle data made available through the Auction by Black Book.
  - a. SmartAuction grants User:
    - i. A personal, non-transferable and non-exclusive limited license to use the pc based application service program consisting of a compilation of certain modules of the

- program combined with the proprietary database (“Program”) of National Auto Research Division, Hearst Business Media Corporation (“NAR”), which consists of fifteen model years of information relating to the vehicle identification number, model year, make, model, series and body style, universal vehicle code, engine descriptions, extra clean, clean, average and rough retail and trade-in values, Finance Advance™, MSRP and extra clean, clean, average and rough wholesale United States pricing information for used cars, vans, and light trucks (“Data”).
- ii. A personal, nontransferable and nonexclusive limited sublicense to use the Data within the Program under a license granted by NAR to SmartAuction.
  - b. User is authorized to use the Data within the Program only to retrieve vehicle values (without the ability to download the Data, in whole or in part, other than with respect to an individual vehicle) for the benefit of its internal operations.
  - c. User acknowledges that:
    - i. NAR owns and will retain all rights, title, and interest in and to the Data, and any derivative works thereof, including, without limitation, all literary property rights, copyrights, trademarks, trade secrets, trade names or service marks, including goodwill.
    - ii. User’s use of the Data or any information therein by anyone other than User or its employees (on a need to know basis) is prohibited by NAR.
  - d. User must keep confidential the Data and use commercially reasonable efforts to prevent and protect the contents of the Data from unauthorized disclosure, copying, or use.
  - e. Although NAR may compile the Data contained within the Program, NAR does not warrant the Program or its contents.
    - i. The Program and Data are provided “as is” and NAR makes no other warranty, express or implied, including, without limitation, as to the accuracy of the data from which the Data is compiled, that the Data is free from errors and omissions, as to the merchantability and fitness of the Data for a particular purpose, or use, or performance, or results obtained by using the Data within the Program.
    - ii. NARS is not liable for any special, direct, indirect, incidental, or consequential damages of any kind or character, including, without limitation, damages for loss of goodwill, work stoppage, all other commercial damages, or losses in connection with the Data.
  - f. User’s obligations concerning use and confidentiality of the Data survive the termination of this Terms of Use.
4. This section IX.L.4 applies to vehicle data made available through the Auction by the National Automobile Dealers Association (“NADA”).
- a. SmartAuction grants User a personal, non-transferable and non-exclusive limited license to use the NADA used car valuation information provided through the Auction (“NADASC DATA”) in its internal business in connection with the SmartAuction service for purposes of valuing vehicles individually as needed in the SmartAuction service.
  - b. User must not:
    - i. Market, sublicense, or use the NADASC DATA other than in connection with the SmartAuction service.
    - ii. Disassemble, decompile, reverse engineer, or otherwise change the NADASC DATA.
    - iii. Use NADASC DATA to create any new database or valuation system.
    - iv. Reproduce, store in a retrieval system, or transmit in any form or by any means (including electronic, mechanical, photocopying, recording, etc.) any vehicle valuation information contained in the NADA Official Used Car Guide, without prior written consent from the National Automobile Dealers Association.

M. Notice:

1. SmartAuction and User may send notices to each other in connection with the Auction by any means, including, without limitation, by e-mail or facsimile to the e-mail address(es) and facsimile number(s) that they provide each other from time to time.
2. Notice is deemed given:
  - a. If by United States mail or commercial delivery service (e.g., FedEx), upon receipt or three business days after it is sent, whichever occurs first.
  - b. If by e-mail or facsimile, 24 hours after a fax or e-mail is sent, unless SmartAuction or User, as applicable, receives notice that the transmission was incomplete or the delivery otherwise failed.

N. Agency:

No agency, partnership, joint venture, employer-employee or franchiser-franchisee relationship is intended or created by this Terms of Use, User's use of the Auction, or otherwise.

O. Governing Law; Jurisdiction:

1. This Terms of Use, and any sales and sales contracts created and generated in connection with User's use of the Auction, is governed by and construed under the laws of Michigan, without regard to conflict of law rules.
2. Any action or proceedings by SmartAuction against User may be brought in any court(s) having jurisdiction over User or, at SmartAuction's option, in the court(s) in the eastern district of Michigan having jurisdiction over SmartAuction, and User consents to jurisdiction and service of process in accordance with applicable procedures.
3. Any action or proceeding by User against SmartAuction may be brought only in the court(s) having jurisdiction over the geographic location of User's principal place of business or in the court(s) in the eastern district of Michigan having jurisdiction over SmartAuction.

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