

**ARTS PLEDGE AGREEMENT BETWEEN
THE CITY OF MCKINNEY, TEXAS, AND DFA, LTD.**

THIS ARTS PLEDGE AGREEMENT (“AGREEMENT”) is made by and between the City of McKinney, Texas (“City”), a Texas municipal corporation, and DFA, LTD., a Texas Family Limited Partnership (“Donor”), as of the Effective Date (defined below).

Whereas, both the Donor and the City believe that public art is a tremendous asset to the community and that it adds value to new development by lending a special sense of identity, creating memorable public places, and conveying a sense of civic purpose; and

Whereas, the parties acknowledge that, as reflected by the creation of the City of McKinney Public Art Program (“Program”), the City is committed to promoting the cultural, aesthetic, and economic vitality in the City by integrating art into public places, civic infrastructure, and present and future development; and

Whereas, the Donor wishes to support the Program through an irrevocable, in-kind or monetary donation (“Pledge”) to the City of McKinney Public Art Fund (“Art Fund”); and

Whereas, the City is willing to accept the Pledge from the Donor to further the goals of the Program, subject to the terms and conditions of this Agreement; and

Whereas, the City and the Donor wish to enter into this Agreement to establish the rights of the parties relating to the Pledge.

Now, therefore, in consideration of the mutual covenants of the parties set forth in this Agreement, the City and the Donor agree to the following terms and conditions:

1. **Recitals.** The recitals set forth above: (a) are true and correct as of the Effective Date; (b) form the basis upon which the parties negotiated and entered into this Agreement; and (c) reflect the final intent of the parties with regard to the subject matter of this Agreement. In the event it becomes necessary to interpret any provision of this Agreement, the intent of the parties, as evidenced by the recitals, shall be taken into consideration and, to the maximum extent possible, given full effect. The parties have relied upon the recitals as part of the consideration for entering into this Agreement and, but for the intent of the parties reflected by the recitals, would not have entered into this Agreement.
2. **Irrevocable Pledge.** The Donor agrees to convey to the Art Fund, the Pledge, as described or depicted on Exhibit A, attached hereto, via check, electronic funds transfer, stocks or other securities, or other methods or non-cash contributions acceptable to the City in its sole discretion. The Pledge will be due and payable to the City on such dates and in such amounts as the City informs Donor that such funds are required for City to pay the artist commissioned to create the sculpture for Mitchell Park (“Sculpture”). The Donor acknowledges and agrees that the Pledge is irrevocable and may not be revoked without the prior written consent of the City; provided, however, that the Pledge will be conditioned upon the City

appropriating an equal amount to pay its share of the total cost of the Sculpture. The Donor further acknowledges and agrees that the Donor will be solely responsible for obtaining any appraisals that may be required by the Internal Revenue Code (“Code”), as amended, and any applicable regulations promulgated thereunder, for non-cash contributions. Donor specifically authorizes City to pay the proceeds of the Pledge to the artist in such amounts and at such times as required to facilitate the completion of the Sculpture. Notwithstanding, anything to the contrary in this Agreement, if the City terminates this Agreement or fails to perform its obligations under this Agreement, any remaining portion of the Pledge that has been received by the City, but has not yet been paid to or otherwise earned by the artist, will be returned to the Donor.

3. **Acceptance of the Pledge.** The City agrees to accept the Pledge for the use and benefit of the McKinney Arts Commission (“Commission”), and in particular, to defray a portion of the total cost of the Sculpture. In consideration for the Pledge, the City agrees to provide (i) a written receipt or acknowledgement of the Pledge to the Donor in accordance with the requirements of the Code for tax deductible contributions, (ii) if applicable, public recognition of the Donor and/or the Pledge, and (iii) support for the Sculpture for a period of at least ten (10) years.
4. **Reservation of Rights.** If at any time, the Sculpture is no longer feasible or supported by the Commission or later found not to be in the best interest of the City, an alternative public art project for the Pledge that approximates the original public art project for which the Pledge was made will be selected upon the mutual agreement of the Commission and the Donor.
5. **Notice.** Any notice or other communication required or permitted hereunder shall be in writing and shall be deemed to have been given if placed in the United States mail, registered or certified, postage prepaid, addressed as follows:

To the Donor: Attn: Don Day
 DFA, LTD.
 110 E. Louisiana Street #204
 McKinney, TX. 75069
 Office: 972.562.0267
 Don@mckinneygrand.com

To the City: Attn: City Manager
 222 N. Tennessee Street
 P.O. Box 517
 McKinney, Texas 75069
 Office: 972-547-7510
 FAX: 972-547-2607

Any changes to the above addresses shall be made in writing, in accordance with the terms of this provision.

6. **Agreement; Amendment; Severability.** This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements, whether oral or written, covering the subject matter of this Agreement. This Agreement shall not be modified or amended except in writing signed by the parties. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable for any reason, such unenforceable provision shall be deleted from this Agreement, and the remainder of this Agreement shall remain in full force and effect and shall be interpreted to give effect to the intent of the parties.
7. **Agreement; Public Art Administrative Guidelines.** This Agreement is subject to the City of McKinney Public Art Administrative Guidelines (“Guidelines”), and in any instance where a conflict exists between the terms of this Agreement and the terms of the Guidelines, the Guidelines shall control.
8. **Funding Out.** The Program is supported by contributions from individuals, corporations, foundations, and developers as well as grants, and on occasion funds from the City. Accordingly, if any part of this Agreement is contingent upon the appropriation of sufficient funds by the McKinney City Council to the Program specifically as it applies to the Sculpture and such funds are not appropriated or any previously appropriated amounts are eliminated or reduced, the City may terminate this Agreement without penalty, charge, or sanction.
9. **Survival of Agreement Provisions.** The representations, warranties, and covenants contained in this Agreement shall survive completion of the transaction contemplated by this Agreement.
10. **Review of Agreement.** The parties understand, agree, and represent to each other that they have had the opportunity to retain independent legal counsel to review the terms and conditions of this Agreement before its execution, irrespective of whether they in fact have retained or consulted with such legal counsel.
11. **Waiver.** The failure of the City or the Donor to exercise any right given hereunder or to insist upon strict compliance with any term, condition, or agreement specified herein, shall not constitute a waiver of either party’s right to exercise such right or to demand strict compliance with any such term, condition, or agreement under this Agreement.
12. **Applicable Law; Venue; Dispute Resolution.** This Agreement shall be governed by and construed under the laws of the State of Texas, and shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representatives, successors, and assigns. Venue shall be exclusive in Collin County, Texas. The parties agree that in the event any dispute should arise between them concerning this Agreement, they will make a good faith, concerted effort to resolve the dispute in an amicable manner without the necessity of litigation, and that they shall first engage in mediation before any lawsuit may be brought.

13. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, but all of which together will constitute one instrument.

Agreed to and executed this ____ day of _____, 2019 (“Effective Date”).

DONOR:

DFA, LTD., a Texas Family Limited Partnership

By and through its General Partner DJD & LCD, LLC, A Texas Limited Liability Company

By: _____
DONALD J DAY
Member

CITY OF MCKINNEY, TEXAS

By: _____
PAUL G. GRIMES
City Manager

ATTEST:

EMPRESS DRANE
City Secretary
MELISSA LEE
Deputy City Secretary

**EXHIBIT A
THE PLEDGE**

Irrevocable Pledge. The Pledge will consist of one or more cash payments totaling \$20,000 payable as follows:

| <u>DATE / EVENT</u> | <u>AMOUNT</u> |
|---|----------------------|
| Due to City on contract signing | \$10,000 |
| Due to City after fabrication | \$6,000 |
| Due to City after installation and approval | \$4,000 |