

**CAUSE NO. C2018-1576B**

Douglas Walter Kirk	§	IN THE DISTRICT COURT
	§	
Vs.	§	
	§	207 th JUDICIAL DISTRICT
Comal Appraisal District	§	
	§	
	§	
	§	COMAL COUNTY, TEXAS

**MOTION FOR SUMMARY JUDGMENT**

Comes now Douglas Walter Kirk, seeking a Motion For Summary Judgment against Defendant Comal Appraisal District, 900 South Seguin Avenue, New Braunfels, Texas, 78130, through its attorney of record, Kirk Swinney (State Bar No. 19588400) at Low & Swinney, PLLC, 623 S. Baker Cir., Leander, Texas 78641, Phone (512) 379 5800.

Through default on Plaintiff’s Discovery Admissions, Defendant has admitted to sufficient claims to show that the Defendant has violated the Texas Tax Code and the Texas Constitution and that the allegations of the Plaintiff are true. Fundamental facts are not in dispute.

**Background**

1. On November 7, 2018, Plaintiff sent a certified letter to Kirk Swinney, Low & Swinney, PLLC, 623 S. Baker Cir., Leander, TX 78641, Certified Number:

7016 2104 0000 6880 3101, sent through the United States Postal Service (USPS).

According to the USPS, attempts to deliver the certified mail were made on November 10, 2018 and again on November 30, 2018, before the certified mail was returned to Plaintiff on December 17, 2018, marked unclaimed. (Exhibit A.)

2. The address written on the envelope matches the address given by Defendant as the address of record for the purposes of this lawsuit.

Contained in the envelope is Plaintiff's first discovery document, titled, FIRST SET OF ADMISSIONS. (Exhibit B.)

3. Plaintiff's Original Petition stated, as follows, "Discovery Control Plan. Discovery is to be conducted under Tex. R. Civ. P. 190.1 (Level 1)."

4. Rule 21(d) of the Texas Rules of Civil Procedure (TRCP) calls for a Certificate of Service, which was provided by Plaintiff. (Exhibit C).

5. Rule 21a Methods of Service (a)(2) states: "Documents Not Filed Electronically. A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct." Plaintiff's First Set of Admissions were served by certified mail on November 7, 2018. (Exhibit D).

6. Rule 21a Methods of Service (b)(1) states: "When Complete. (1) Service by mail or commercial delivery service shall be complete upon deposit of the document,

postpaid and properly addressed, in the mail or with a commercial delivery service.”

Plaintiff’s First Set of Admissions were mailed through the United States Postal Service on November 7, 2018, postpaid and properly addressed to Defendant’s attorney of record.

7. Rule 21a Methods of Service (c) states: “Time for Action After Service.

Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.” November 7, 2018 plus three days is November 10, 2018.

8. Rule 198.2 Response to Request for Admissions (a) states: “Time for response.

The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant’s answer is due need not respond until 50 days after service of the request.” Defendant filed his answer to the lawsuit electronically with the court on September 7, 2018, and while Defendant signed a Certificate of Service stating that the Plaintiff was sent a “true and correct copy” of the answer, stating that it was sent to dougkirk@gvtc.com, it was not sent to Plaintiff by any means, including via e-mail. Nonetheless, Plaintiff’s Request for Admissions was sent to Defendant via certified mail on November 7, 2018, a full 60 days after Defendant’s answer.

Therefore, according to Rules 21a(c) and 198.2(a), Defendant had until December 11, 2018 (3+30 days) to respond to the Request for Admissions served upon him by Plaintiff. Note: As of the date of the filing of this motion, Defendant still has not responded to Plaintiff's Request for Admissions.

9. Rule 198.2 Response to Request for Admissions (c) states: "Effect of failure to respond. If a response is not timely served, the request is considered admitted without the necessity of a court order." According to the Texas Rules of Civil Procedure, then, Defendant was properly served by certified mail with ample time to respond and therefore, each of the 73 Admissions has been agreed to by Defendant.

#### Summary Judgement Grounds

1. Plaintiff's Original Petition For Review By District Court alleges regarding the property subject this suit in Paragraph 11: "Appraised Value At Issue. The appraised value of the identified property in this petition is at issue and is the cause of this action. The Texas Property Tax Code and the Texas Constitution require property to be appraised for taxation at market value as of January 1. The appraised value of the property the subject of this appeal exceeds market value and is therefore unlawful..."

See:

a. Paragraph 11, page 4 of the original petition;

b. Texas Tax Code, Title 1. Property Tax Code, Subtitle D. Appraisal and Assessment, Chapter 23. Appraisal Methods and Procedures, Subchapter A. Appraisals Generally, Sec. 23.01, which states: “APPRAISALS GENERALLY. (a) Except as otherwise provided by this chapter, all taxable property is appraised at its market value as of January 1” and,

c. Texas Constitution, Art. 8 Sec. 1, Equality and Uniformity of Taxation, Sec. (b), which states: “All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.”

2. Admission No. 47, to which Defendant has admitted by default states: “47. Admit / Deny that Defendant (Comal Appraisal District) exceeded the appraisal value required by law for property subject of this lawsuit (Prop. ID: 82819, Legal Desc: A-939 SUR-804 H LUEHLFING, ACRES 9.895).”

3. Admission No. 33, to which Defendant has admitted by default states: “33. Admit / Deny that Defendant (Comal Appraisal District) believes that its estimated values of property may not be accurate.”

4. Plaintiff’s Original Petition For Review By District Court alleges regarding the property subject the suit in Paragraph 12: “Uniform Appraisal. The Texas

Property Tax Code and the Texas Constitution require property to be appraised in an equal and uniform manner. The property the subject of this appeal has been appraised unequally and the appraised value is therefore unlawful.”

See:

a. Paragraph 12, page 4 of the original petition;

b. Texas Constitution, Art. 8 Sec. 1, Equality and Uniformity of

Taxation, Sec. (a), which states: “Taxation shall be equal and uniform.”

5. Admission No. 58, to which Defendant has admitted by default states: “58. Admit / Deny that Defendant (Comal Appraisal District) appraised property the subject of this lawsuit (Prop. ID: 82819, Legal Desc: A-939 SUR-804 H LUEHLFING, ACRES 9.895) in an unequal and nonuniform manner.”

6. Admission No. 72, to which Defendant has admitted by default states: “72. Admit / Deny that Defendant (Comal Appraisal District) did not equitably value the property the subject of this lawsuit (Prop. ID: 82819, Legal Desc: A-939 SUR-804 H LUEHLFING, ACRES 9.895).”

### Conclusion

1. Regarding Appraised Value: Defendant has admitted violating Texas Law and the Texas Constitution regarding appraised value as alleged in the original petition.

Consequently, there are no facts in dispute and the Plaintiff is entitled to Summary

Judgment against the Defendant.

2. Regarding Uniform Appraisal: Defendant has admitted violating Texas Law and the Texas Constitution regarding uniform appraisal as alleged in the original petition. Consequently, there are no facts in dispute and the Plaintiff is entitled to Summary Judgment against the Defendant.

### Remedies

Plaintiff seeks all remedies to which he is entitled under law, as specified in Texas Tax Code Sections 42.24, 42.25 and 42.26 or any other code or section.

a. Plaintiff asks the Court to fix the appraised value of the property at issue to \$175,286 for 2018, which is the five year average (2013-2017) of appraisal values provided by the Defendant. (There was no new property or improvements between 2017 and 2018. The property was last inspected by the Defendant on September 12, 2017 and appraisal values have been set for greater than the past five years by the Defendant.) (Exhibit E and Exhibit F.) (Sections 42.24 (1) and 42.25.)

b. Plaintiff asks the Court to enter orders necessary to ensure equal treatment under the law on behalf of the Plaintiff. (Sec. 42.24 (2).)

c. Plaintiff asks the Court to enter orders necessary to preserve rights protected by and impose duties required by the law. (Sec. 42.24 (3).)

d. Plaintiff has been injured by the unlawful appraised value. Defendant

caused imposition of a tax on the property the subject of this suit, exceeding the lawful amount, thus injuring Plaintiff. Plaintiff asks the Court to order Comal County Tax-Assessor Collector Cathy Talcott to return to Plaintiff any excess tax monies demanded and paid or to be paid for the 2018 tax year.

e. Attorney Fees. Plaintiff seeks all attorney fees to which he is entitled under Sec. 42.29 of the Texas Property Code, and any other relief, including costs of court, to which he may be entitled.

Prayer

Plaintiff prays the Court grant Summary Judgement in this cause and provide all remedies and monies delineated herein and / or which the Court may deem appropriate. Further, Plaintiff prays the Court issue orders setting the value of Plaintiff's property and restricting Defendant's behavior to within Texas law and Texas constitutional constraints. Plaintiff prays the Court deny any relief of any kind to Defendant relative to this cause of action.

Respectfully Submitted,

By \_\_\_\_\_  
Douglas Walter Kirk, *pro se*  
1850 Old Sattler Road  
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E-mail: dougkirk@gvvc.com

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Texas Rules of Civil Procedure on this the \_\_\_\_\_ day of January, 2019, a true and correct copy of the foregoing has been served by certified mail on Defendant Comal Appraisal District, 900 South Seguin Avenue, New Braunfels, Texas, 78130 through its attorney Kirk Swinney (State Bar No. 19588400) at Low & Swinney, PLLC, 623 S. Baker Cir., Leander, Texas 78641, Phone (512) 379 5800. Certified Number: 7016 2104 0000 6880 3118.

By \_\_\_\_\_  
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