Summary of the written statements of the defendant's legal counsel

The written statements summarised below were submitted to the plaintiff's counsel by the defendant's counsel on 15 November 2016.

A. Preliminary remarks

The defendant's counsel will state its legal position only with regard to the counterpleas dated 11 July 2016 and 29 September 2016. The plaintiff has not complied with his procedural duty to assist the defendant in fulfilling its procedural obligations [*Förderungspflicht*], because only in his most recent submission did the plaintiff provide details on the facts of the case, the defendant's alleged contribution to the cause, and the risk of flooding. Therefore, simply due to time constraints, it is impossible for the defendant to provide a proper, comprehensive response. The defendant maintains the position set out in its response to the claim, because the facts most recently submitted by the plaintiff are irrelevant.

- The claim is inadmissible and unfounded and should therefore be dismissed. Climate change is not a risk that is created by or attributable to an individual. It is a global political issue that requires solutions at national and international levels.
- It is clear from the submissions by the plaintiff that his legal opinion is erroneous. His argument would entitle him to file a claim against every emitter, i.e., every enterprise and every natural person. As it would be impossible to file a suit holding every emitter accountable for completely eliminating the alleged risk, a pro rata claim is not an appropriate means for the plaintiff to realise his objective.
- Claiming the defendant as joint and several debtor is also legally untenable, because the internal liability to pay compensation is neither feasible nor enforceable in the context of a civil procedure.
- It is clear from the counterpleas that the plaintiff's allegations cannot be asserted, and an equitable solution achieved, in the context of a civil proceeding.
- If, in the court's view, the plaintiff's submissions are relevant, notification by the court to this effect is requested.

B. The claim is inadmissible

I. The main claim is inadmissible

It is the opinion of the defendant's counsel that the claim demonstrates a lack of legitimate interest and a lack of precision.

1. Lack of legitimate interest

Contrary to the position argued by the plaintiff in the submission dated 11 July 2016, legitimate interest cannot be justified on the grounds that the costs are non-quantifiable. The provisions of section 1004(1) of the German Civil Code [*Bürgerliches Gesetzbuch* (BGB)] refer to the abatement or removal of an interference with property, not to the costs or the acquisition of any financial advantage. In this respect, the cost estimate in the plaintiff's submission is irrelevant. However, out of an abundance of caution, the amount of the costs is contested.

In addition, contrary to the plaintiff's assertions, section 249 et seqq. of the BGB is not applicable to claims arising in connection with section 1004 of the BGB. These provisions determine the extent of liability [*Haftungsausfüllung*] and do not constitute an independent basis for the claim.

2. The claim lacks precision [***Bestimmtheit***]

The claim does not fulfil the requirements for precision stated under section 253(1)(2)(2) of the Code of Civil Procedure [*Zivilprozessordnung* (ZPO)], because the 'contribution to the interference' cannot be determined with sufficient precision. With regard to the alleged emissions, cooling emissions and the influence of natural processes were not taken into account, and no time period was specified. As a result, there is no calculation basis, which is required for an evaluation by the court.

II. The alternative claims are inadmissible

It is in fact impossible for the defendant to eliminate the interference, because constructing a fraction of the proposed pipe or pipe system for lowering the water level would not achieve this objective. In this respect, the alternative claim is inadmissible.

With regard to the second alternative claim, in the absence of further details from the plaintiff, the defendant contests the legal status, role, authority and jurisdiction of the municipality that was designated as the potential recipient of the payment. In addition, there is no explanation of how exactly the payments would be used and how use of the funds for this purpose would be ensured. The association of municipalities has no right of action, and it is not clear that the plaintiff is entitled to claim payment to a third party.

C. The main claim is unfounded

1. No civil liability for climate change

The plaintiff went beyond the limits of the meaning intended under section 1004 of the BGB, particularly with regard to causation, and is inclined to reinterpret the decisions rejecting the claim in the cases on forest damage [*Waldschaden*]. The *Waldschaden* judgments do not have entirely different assessment criteria, as the plaintiff asserts. Instead, the assessment concerns the infringement of duties, causality (particularly adequate causation), damage, and fault under the provisions of section 839 of the BGB.

The passage cited by the plaintiff entirely misses the point, because it addresses section 14(2) of the Federal Immission Control Act [*Bundes-Immissionsschutzgesetz* (BImSchG)].

The plaintiff assumes that the need for individualised causation in the context of section 14(2) of the BImschG is only the result of the provision's basis in neighbour law; he fails to recognise the fact that causation is the absolute minimum criterion for attribution as a basis for any liability. In the *Waldschaden* judgments, the BGH unambiguously rejected a civil law claim asserting cumulative and long-distance damage, because the indistinguishable mixing of emissions rendered attributability impossible. The case law of the BVerfG should also be interpreted in this way. In addition, the judgment of the Higher Regional Court [*Oberlandesgerichtof* (OLG)] of Cologne, cited by the plaintiff, cannot be interpreted differently: in that case, the claim was accepted precisely because an individual causal relationship was undeniable.

The literature submitted as evidence by the plaintiff himself[1] excludes a civil law claim for immissions transported over long distances and produced by multiple sources on the grounds that attribution and causality could not be proved. This interpretation is confirmed in additional relevant literature, as well as in the legal basis for the Environmental Liability Act [*Umwelthaftungsgesetz* (UmweltHG).

The Environmental Liability Act is not applicable here, contrary to the plaintiff's assumption. In addition, if pollution is not clearly divisible, an individual and immediate causal relationship is required. Alleging that the contribution represents a percentage of total emissions is not sufficient. There must be full proof of the individual, concrete causal connection, taking into account the lack of linearity in the processes of the climate system, various feedback mechanisms, and natural causes. If the standards applied by the plaintiff are accepted as a basis for liability, the judiciary will be overstepping its bounds by improperly making law.

The deliberations of the European Parliament on the amended Environmental Impact Assessment (EIA) Directive (2014/52/EU) have shown that climate change cannot be legally operationalised. In its decision, the OVG of Münster confirmed that, due to a lack of technical and scientific knowledge, changes in the climate could not be attributed to individual facilities.[2]

It is not possible to attribute such changes to individuals because climatic processes—which involve the intermingling of emissions, the cycle of gas exchange, and chemical degradation—are so complex. Please refer to the decision of the Immission Control Committee of the German Federal States [*Länderausschuss für Immissionsschutz*] of 25-26 April 1983.

II. Entitlement to the abatement of a disturbance, as established in section 1004(1) of the BGB, does not apply

Even if there were a flood risk—which remains in dispute—the defendant would not qualify as a disturber, nor would the alleged interference be illegal.

[1] Murswiek, NVwZ 1986, 611.

[2] Higher Administrative Court [*Oberverwaltungsgericht* (OVG)] of Münster, judgment of 16 June 2016, Az 8 D 99/13.AK, Tz. 407

1. The defendant is not a disturber

The defendant contests the volume of global historical emissions alleged by the plaintiff, as well as the fundamental attribution of emissions to individual issuers. The defendant did not cause the disturbance through its actions or omissions [*Handlungsstörung*], as it made no causal contribution that fulfils the criteria for adequate causation.

a) No assessment of the causal link that would justify liability under section 287 of the ZPO [*haftungsbegründende Kausalität*]

As explained previously, it was erroneous to assume that the causal link could be assessed in accordance with section 287 of the ZPO. The provisions of the ZPO that apply to the grounds for liability are not found in section 287, but in section 286, which specifies strict requirements. The plaintiff must provide full proof of the causal relationship that would provide the basis for liability. Full proof would include the entire causal chain, from emissions to glacier melt to the flood risk. The ruling cited by the plaintiff (BGHZ 66, 71) relates to damage caused directly and is therefore not relevant to the present case, which alleges indirect causal relationship between an incalculable number of emissions and emitters.

b) No cumulative causality according to the equivalence theory

Cumulative causality presupposes that multiple actions that are inadequate individually produce a given result only if combined, but this result would not be produced if any one contribution were eliminated.[3] The emissions by the defendant are not a necessary condition for the flood risk, and the risk would not be eliminated in the absence of these emissions. If it allows for the use of an 'abstract, global' climate model to demonstrate individual causation outside the scope of the equivalence formula, the judiciary will be exceeding its bounds by improperly making law.

c) No adequate causation

Adequate causation would apply if the emissions significantly increased or facilitated the possibility of the outcome. The significance requirement has not been met, however, given the alleged contribution of 0.47% of total emissions and the lack of linearity in the processes of the climate system. In addition, there is no legal grounds for holding the defendant accountable for the fact that the relevant area was repopulated after flooding in 1941, contrary to the city's instructions. The plaintiff also contradicts himself by claiming in his most recent submission—contrary to his previous statement—that there was scientific knowledge of the issue before the 1980s.

d) No duty of care

The plaintiff confirms in his submission that the alleged flood wave is the product of natural conditions of the lagoon and adjacent glacier, as well as natural temperature trends. The risk to the plaintiff stems from the location of his property and the fact that, by nature, water flows downhill. According to established jurisprudence, in the presence of natural forces that have such effects, the term 'disturber' must be modified to require a duty of care.[4]

[3] Erl, Einführung in das Umwelthaftungsrecht, 4.3.1.1, S.80; Brüggemeier, UTR 1990, 261, 269; Hager, NJW 1991, 134, 139; OLG Düsseldorf, NJW 1998, 3720

[4] BGH, NJW 2004, 1037, 1039; BGH, NJW 2004, 1035, 1036; BGH, NJW 2004, 603, 604

The defendant does not have a duty of care of this kind by virtue of its property, because it does not own or have authority over the lagoon, which is the source of the disturbance. In addition, a duty of care cannot be derived from any legal relationship between neighbours, because there is no such relationship. In addition, there is no duty of care arising from a legal obligation to eliminate a risk to third parties from a source to which the defendant has contributed [*Ingerenz*]. The defendant has not produced any legally objectionable hazard or risk of the alleged flood danger. The defendant's power plants have operated with the required permits at all times and are indisputably protected by law. The legislature gave the operation of power plants explicit state approval under section 4(1) of the Greenhouse Gas Emissions Trading Act [*Treibhausgas-Emissionshandelsgesetz* (TEHG)]. The defendant, which supplies power to more than 16 million customers, operates a business that is customary and acceptable within existing social norms [*Soziale Adäquanz*] and in the public interest.

2. No illegality

For the reasons stated above, 'disturber' criteria are not met and therefore have no implications for illegality.

D. Alternative claims are unfounded

II. First alternative claim

The first alternative claim is unfounded because it is impossible for the defendant to construct a proportionate segment of a drainpipe; this also would not succeed in completely eliminating the alleged flood risk.

II. Second alternative claim

The second alternative claim is unfounded because the designated association of municipalities is not an eligible claimant, and section 1004(1) of the BGB, cited by the plaintiff, does not establish grounds for the requested payment.

III. Third alternative claim

The third alternative claim is also unfounded. Pleading a lack of knowledge, the defendant contests the suitability of the reconstruction measures to protect from flooding, the alleged costs for such measures, the authenticity of the invoices submitted, and the itemisation of allegedly active work. Furthermore, the basis for the claim does not meet the necessary conditions, because the plaintiff has not undertaken any third-party activity for the defendant to eliminate the interference, and the defendant does not meet the criteria for a 'disturber'.

In addition, there is no joint and several liability in light of the application of section 830(1)(2) of the BGB (which is only relevant for cases concerning a single potential cause[5]) and in light of the feasibility and enforceability of an internal liability to pay compensation (as in the *Kivalina* judgment).

E. In the alternative: Exclusion of claim by analogy with section 254(1) of the BGB

Even if there were grounds for a claim under section 1004(1) of the BGB, it would be excluded by analogy with section 254(1) of the BGB.

[55] Kohler, in Staudinger, UmweltHR, Neubearb. 2010, Einl., Marg. 215; Ladeur, DÖV 1986, 445, 446; Marburger, in: Forest damage as a legal problem, UTR 2 (1986), p. 145.

The relevant area was repopulated after the 1941 flood, contrary to the city's instructions. The plaintiff's property was constructed at a dangerous location without formal planning permission. Accordingly, it is not the defendant, but the plaintiff and the local population who bear responsiblility for their own protection and safety measures, according to established case law.[6]

F. In the further alternative: Limitation period

The plaintiff has been aware of the interference since 2009 or, if not, has lacked knowledge of it out of gross negligence. As a result, the claim became time-barred in 2012.
The action should be dismissed because the plaintiff's claims are invalid.

This summary was prepared on a voluntary basis by Tim Sterniczuk and Francesca M. Klein of the Institute for Climate Protection, Energy and Mobility (IKEM). English translation provided by Kate Miller, also of IKEM.

[6] BGH NVwZ 1990, 297, 298; BGH, NJW 1985, 1773, 1774.