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“Hinkley Groundwater Contamination — How Pacific Gas & Electric Avoided Negotiation:
A Reassessment of the Changing Scope of Historical Mass Tort Cases”

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Hinkley Groundwater Contamination—How Pacific Gas & Electric Avoided Negotiation: A Reassessment of the Changing Scope of Historical Mass Tort Cases

I. Introduction

A. The Hinkley Case – New Issues Unearthed

In the famous Hinkley Groundwater Contamination case (“Hinkley”), Pacific Gas & Electric (“PG&E”) had released “hexavalent-chromium, a cancer-causing substance, into the water supply, ultimately affecting the local groundwater of nearly 650 Hinkley residents.”¹ What is shocking about this case is PG&E’s failure to notify the locals of the toxins they had dumped into the environment; and whether PG&E’s “notification flyer” had actually warned anyone prior to the danger.² It makes you wonder, “what else [PG&E was] trying to cover up and avoid?”³ While there were multiple attempts at arbitration, every attempt at negotiation was turned down, and the case eventually settled in court. The *Hinkley* case sparked a trend for PG&E and other large corporations: to hide the facts, to set aside blame, and to sweep their issues under the rug. However, there still remain unsettled questions in *Hinkley*, which include: why was PG&E so willing to settle in court?; how was PG&E able to avoid the multiple attempts at negotiation?; and should large corporations be getting away with this today? The outcome of *Hinkley* not only brought change to the individuals affected in the area, but brought change to the way class-action (“class”) negotiations are approached today. *Hinkley* depicts a story of change; one that has changed the scope of class-action disputes, and has provided more insight to ways negotiators can overcome power disparities that arise between community members and large corporations. Bridging the gap between large corporations and communities requires less drawn out trials, and more solutions created at the negotiating table. Ultimately, solving disputes at the negotiating table rather than in the courtroom, will prevent large corporations from abusing their power and even the playing field for class members.

¹ In-person interview with Erin Brockovich, Consumer Advocate, Erin Brockovich Research & Consulting (Nov. 2, 2014).

² *Id.*

³ *Id.*

B. Class Negotiations – The Benefits of Avoiding Class Action Lawsuits

Even when the harm to a local community is unmistakably clear, there is often little recourse when large corporations “argue the science, since there is a chance they could get out on that. They throw us the junk science all day long, just to stall. They stall because they think they won’t have to pay out. They think that saves them money.”⁴ However, the issue with class negotiations, especially those involving hundreds of individuals, is that corporations know that litigation can be drawn out and lead to expenses that the individuals are unwilling, or unable to pay. While getting large corporations to own up to their wrongdoing is difficult, getting them to sit down to negotiate fairly is an even bigger challenge. We can learn from *Hinkley* that litigation creates an ongoing battle for both sides, not just the vulnerable party. Taking into account the moral and ethical issues involved, rather than just the economic ones, creates a shift in the way class action disputes are handled, and will lead to solutions that benefit all parties—a type of thinking that focuses on present issue for future change.

C. Reaching a Solution that Matters

Negotiating on behalf of a class brings challenges to reaching a solution since, “[t]he negotiation dynamic . . . become[s] more complex, and there may be sub-bargaining within the more comprehensive negotiation.”⁵ When negotiating on behalf of a party that involves hundreds or thousands of individuals, there is the possibility that of one or more class members will want to hold out from a settling.⁶ Negotiations involving a class requires the negotiator to pay attention to the “fairness of settlements and the need for court approval,”⁷ making sure the solutions adequately serve the needs of each individual, beyond monetary factors. The

⁴ *Id.*

⁵ Jay Folberg & Dwight Golann, *Lawyer Negotiation: Theory, Practice, and Law* 113-14 (Aspen Publishers, 2nd ed., 2011).

⁶ *Id.* at 114.

⁷ *Id.* at 243.

negotiator must shift his or her role from primarily interest-based, to that of trust-based, thus “being able to create value, but the more extensively . . . persuade constituents that these activities are appropriately advancing [everyone’s] interests.”⁸ When approaching a negotiation, whether “on one’s own behalf or that of others, a site of negotiation is created, a *table*.⁹ When this table is uneven, that is, when there are major power imbalances at play, there becomes an initial distortion to our thinking. However, as negotiators, “[t]he most fundamental insight . . . involves recognizing the imbalances *we create* in our perception of reality when we overemphasize dominance of power.”¹⁰

The goal of this paper is not to provide a “catch-all” solution to negotiating on behalf of large classes, but to re-establish the value of negotiation in the ongoing dispute in Hinkley. While the benefits of negotiation far outweigh litigation in terms of costs, time, and future relationships, the negotiating table still seems to be “disappearing.” This consistent theme supports treating class action disputes differently than we have in the past, and recognizing the need to create solutions that offer “mutual gain.” This paper will analyze how large corporations, like PG&E, have been able to avoid negotiation in the past, and provide insight to ways community members, or other injured parties can bring large corporations back to the negotiating table. Part II focuses on the negotiating framework of class action disputes, and the ethical challenges of meeting the needs of each individual class member. Part III discusses the *Hinkley* case in regards to power disparities and explores ways to overcome this challenge. Part IV examines the process of negotiation, such as bargaining techniques, perceptions, and pay-offs.

⁸ ROBERT H. MNOOKIN & LAWRENCE E. SUSSKIND, *NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS AND EVERYBODY ELSE* 53 (1999).

⁹ PHYLLIS B. KRITIK, *NEGOTIATION AT AN UNEVEN TABLE: DEVELOPING MORAL COURAGE IN RESOLVING OUR CONFLICTS* 25 (2d ed. 2002).

¹⁰ *Id.* at 31. (emphasis added)

Part V concludes by suggesting how injured parties can bring the discussion back to the *table*, and how this shift will impact interactions between communities and corporations in the future.

II. Negotiating on Behalf of a Class – Ethical Considerations & Interests Involved

A. *Weighing Options – The Negotiating Triangle*

Approaching a situation as solution-driven, rather than assigning blame requires an understanding of the components of negotiation, which include the following factors: 1) emotional and psychological; 2) extrinsic and social; and 3) economic and legal.¹¹ These sets of factors represent the “triangle” of negotiation, and more broadly, the fundamental goals of the negotiation.¹² Understanding the internal pushes and pulls on parties allows the negotiator to recognize the root of the conflict, and how the parties perceive a situation. For example, in *Hinkley*, the interests of the community were: 1) family values (i.e. maintaining the integrity of injured or deceased family members; 2) long-term relationships (i.e. relying on PG&E for work and services); and 3) convenience (i.e. accessibility to clean drinking water, preserving the roots that many families had established in Hinkley, and continuing to live a lifestyle conducive to health and safety).¹³

In *Hinkley*, the town’s counsel knew these extrinsic factors would play a major role in the proceedings, and attempted to voice the following concerns and objectives to PG&E: cleaning up the physical environment; providing adequate social and living conditions; and preserving positive relations following this matter.¹⁴ While Hinkley’s counsel knew that negotiation was the best means of getting PG&E to see beyond the economic and legal issues, many failed attempts at negotiation led to a failure to meet solutions centered on emotional or social factors. Erin Brockovich, who advocated on behalf of Hinkley residents, recounted:

¹¹ Folberg & Golann, *supra* note 5 at 7.

¹² *Id.* at 6–8.

¹³ Brockovich, *supra* note 1.

¹⁴ *Id.*

When identifying the interests of Hinkley residents, we had to think beyond monetary interests; and even more about the future interests, rather than just the present situation and past harm. Their main interest was, simply assurance—assurance that safe water would be delivered to their homes. That’s all part of the negotiation. People didn’t want to move from their homes. Maybe we could have negotiated with the company: ‘you’re going to pay and put [the residents] in a rental for one year, while you clean up their home, so when they come back, they still have their home.’ If we had negotiated clean up measures then in there, present and future home values could have been restored. Just because there is pollution, doesn’t mean it is tainted forever. We did have viable options for cleanup. But [PG&E] chose not to recognize [these options].¹⁵

Reflected in the statement above, it is clear that there were solutions that could have been solved outside of the courtroom. However, PG&E only focused on the legal and economic values at stake. Had PG&E understood the overarching interests of Hinkley residents back in 1991, PG&E would not be cleaning up their mess twenty-three years later. From *Hinkley*, we can learn the importance of understanding the various components of a dispute, no matter what the root of the dispute may be. Moreover, how a resolution appears to absent parties (i.e. class members not present during negotiation), hinges on whether the fundamental goals of the negotiation are achieved.

B. Representing the Whole Town – Building Rapport

While large communities face the challenge of instructing the negotiator so as to maximize the negotiator’s ability for success,¹⁶ the negotiator too worries that he or she will not

¹⁵ Brockovich, *supra* note 1 (discussing the ethical considerations: “If you are a CEO of a large corporation, you need to become a leader. You need to look at your morality. You need to look at what your priority is. The community doesn’t want you to go away. That is not the answer. Because they need that job; they want to pay for the house; they want to send their kids to college. And you frankly need that community to run the company. ‘So why would you not come out there and negotiate?’ Tell your attorney we are going to negotiate. Have the plaintiff attorney tell the community we are going to negotiate. You may not get a billion dollars, but you may get your land cleaned up; you may be paid some restitution; and the company will stay. And you get to keep your job.”). By focusing on interests in future relationships, the best way to reach a mutual solution is to bring awareness of non-monetary issues driving the dispute. Enabling CEO’s of companies to see the benefits of working with the community, rather than against them, there is room for more creative solutions.

¹⁶ MNOOKIN & SUSSKIND, *NEGOTIATING ON BEHALF OF OTHERS: supra* note 8 at 59.

have enough authority to meet the needs of all members of the community.¹⁷ This challenge is multi-faceted and requires persistent communication between both the negotiator and the community. While direct communication is not commonly available during class negotiations, the negotiator must understand the nature of the negotiation, and speak for the community in a way that reflects the extrinsic values of the *entire* community.

Negotiation is a dynamic process, taking on many shapes and forms, whether we are negotiating on behalf of ourselves, or others. Often, negotiators are able to adjust his or her technique to best serve the interests of a client in any particular situation. However, in the context of class negotiations, the relationship between the negotiator and clients is much more broad, and affects the overall representation of the client's interests. In *Hinkley*, where one party was made up of nearly 650 individuals, the counsel faced an even bigger challenge—not only did they need to get PG&E to agree to negotiation, but the counsel also needed to ensure that the interests of each individual member was endorsed.

A successful negotiation in *Hinkley* would have been structured around relationships; between the parties in conflict, between members of the same party, and most importantly between the negotiator and the class as a whole.¹⁸ This ideal relationship is based on trust—a trust that is only achieved if the negotiator focuses on the underlying objective, being: advocating collaboratively to find a mutual solution, and transform the relationship of the parties to one that is more integrative. However, focusing on this objective, the negotiator must also understand that everything he or she thinks or does, is geared towards the interests of the class. This involves the ability to facilitate a settlement using emotional intelligence—a settlement based on the interests and needs of the public, and one that will be upheld in the future. Since

¹⁷ *Id.* at 77.

¹⁸ See generally MNOOKIN & SUSSKIND.

class action negotiations involve one, or few representatives advocating on behalf of many, it is important for the negotiator(s) to endorse the many voices of the public.

C. *Being the Voice of the Town – Active Listening & Understanding*

Being the voice of a community does not just mean speaking on behalf of your client; it involves active engagement and listening, as well as understanding what it is that your client is actually saying. The structure and preparation for a class negotiation changes the way a negotiator gathers and uses information. While a negotiator representing an individual is able to engage and ask questions about the specific needs and interests of that person, gathering this information is often difficult to do in class action settings. While the *general* goals of a class may be similar, the underlying interests of each individual class member are often slightly different. Understanding the needs of communities and expressing these needs during negotiation is based on our psychology and ability to exercise emotional intelligence.

Psychology plays a dual role in negotiation, both intrapersonal (conflicts within ourselves) and interpersonal (differences that arise between individuals or groups). We have to consider the factors that we never did before: cognition; motivation; emotion; power and influence; relationships and teams; technology; and culture.¹⁹ Everything we do is based on our psychology, and is basic to our human-to-human interactions. Representing a community begins with making these connections, and “sometimes that is all the community needs; just for us to hear them.”²⁰ The decisions that a negotiator makes during a negotiation have impacts that affect the parties immediately after the parties leave the room. Even when parties do not communicate directly after a negotiation, the parties often have future dealings whether they are direct or not.

¹⁹ Michael J. Gelfand, Ashley C. Fulmer & Laura Severance (in press), *The Psychology of Negotiation and Mediation*, in APA HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 495 (Sheldon Zedek ed., 2011).

²⁰ Brockovich, *supra* note 1.

Understanding the needs and interests of a client, both currently and in the future, allows the negotiator to lead towards solutions that are unique to the client's particular situation, rather than using a "catch-all" approach. Outside the emotional or social factors affecting the negotiation, are the surface-level factors: economic and legal. These factors are what bring lawyers to the negotiation, which results in a bargain over money. While this is often a driving factor, focusing solely on the financial payout may work against a settlement. Therefore, it is important to rely on the triangle of negotiation when approaching any given dispute.

D. Ethical Considerations – Competing Interests of Individual Class Members

While *settlement* objectives are the same whether a negotiator is representing an individual or an entire community, the negotiator seeks to maximize the interests of his or her clients. However, establishing the specific interests and needs of a particular party must be addressed "in light of the circumstances presented by each case."²¹ Disputes involving multiple parties have become more common, and the additional parties involved, combined with the increased number of members of an injured class, complicates the negotiating process, which may limit the bargaining options that a negotiator may have. An increase in the number of class-members makes it difficult for negotiators to coordinate with the party he or she is representing, because large classes of individuals often have multiple, and often contending interests. Contending interests change the dynamics of the negotiation process, and gives rise to important strategic and legal considerations that must be recognized by the negotiator.

While some of these considerations will concern all the parties involved, and often the general interests of a class, the negotiator must remain hyper-vigilant to the concerns of *each* class member. Due to the intensity and complexity of class action disputes, it is often difficult

²¹ Neal Manne, *Multiple-Party Problems: Discovery, Settlement, Unwritten Deals and Alliances* 7 (Prepared for The University of Houston Law Foundation; CLE: The Jury Trial 2009, Aug. 6-7, 2009)

for the negotiator to advise his or her client of every possible scenario. Nevertheless, the negotiator is best able to serve the needs of the class by advising the class members of the pros and cons of the negotiation, and how certain decisions will affect the overall outcome of the negotiation. Thus, “the more you involve [the class] in that process, the less likely you will have unhappy client[s].”²² Involving a class in the process involves an understanding of the interests, not just the position that the class holds. Interests are the motivations that drive our behavior, which the negotiator must identify from the start, as to generate options for mutual gain.²³

III. Negotiating at Uneven Tables – Ridding of Power Disparities

A. Town of Hinkley v. Pacific Gas & Electric – Moot Issues

Our perception of the opposing party is a driving force on our role in a negotiation—whether the other party is making irrational threats; whether the other party is committed to the negotiation; or whether or not we trust the other party. What the opposing party says in a negotiation does not become powerful unless the recipient believes the person making the offer or threat has the capacity to carry it out. In *Hinkley*, the town’s counsel believed there was room for negotiation before filing a suit in court, but PG&E attempted to string the litigation along, in hopes to avoid negotiation.²⁴ PG&E’s successful evasion of negotiation made it harder for them to face the truth, that is, to actually see the harm that they had done to Hinkley residents.²⁵ Had the case gone to negotiation, Hinkley residents would have been able to avoid the fear of favoritism and conflict of interest that arbitration was designed to protect against. However, *Hinkley* presents a case where resolution failed; not because the arbitration led to faulty payouts, but because negotiation was so easily avoided. Though arbitration is an alternative to the high

²² *Id.* at 14.

²³ *See generally*, Neal Manne.

²⁴ Brockovich, *supra* note 1.

²⁵ *Id.*

burdens of trial, arbitration still favors the litigants that can afford it, thus giving way to a system that creates uneven playing grounds.²⁶

B. Fairness – Recognizing an Uneven Table

When parties sit down to negotiate, fairness guides the proceedings and determines whether or not there is an “even playing field,”²⁷ and whether a viable solution will be met. Fairness “refers to something being ‘balanced, in equilibrium, [or] equal.’”²⁸ A negotiator’s task in a conflict is “to increase his or her potential for success, [which is accomplished] by actively structuring for an even table.”²⁹ Generally, an even table can be created if the negotiator “make[s] certain that all parties to the conflict have a seat at the table.”³⁰ However, this becomes an issue in class negotiations because giving clients fair representation must be done without giving them an actual seat at the table. When class representatives purport to negotiate settlement for absent class members, it is often difficult to measure the fairness of the proceedings. Since a court’s role is “to determine if the negotiated settlement is fair to absent class members and not just a collusive convenience favorable to those at the table,”³¹ the fairness is not decided until after the negotiation has closed.

While “[t]he prospect of possible objections plays an important role as a safeguard in protecting the interests of absent class members,”³² the scrutiny of the court “in promoting fairness and preventing collusive negotiation”³³ should still remain at the hands of the negotiator *during* the negotiation. Since objective courtrooms do not judge fairness until *after* a negotiation has ended, the negotiator should ensure that the discussions and resolutions represent fairness *at*

²⁶ *Id.*

²⁷ KRITEK, NEGOTIATION AT AN UNEVEN TABLE, *supra* note 9 at 38.

²⁸ *Id.* at 39.

²⁹ *Id.*

³⁰ *Id.*

³¹ Folberg & Golann, *Lawyer Negotiation*, *supra* note 5 at 378.

³² *Id.* at 379.

³³ *Id.*

the time the negotiation takes place. Ultimately, if negotiators are able to reach a resolution without having to go to court, the class members are able to avoid the burdens of litigation, and achieve a fair solution as if they too were actually present at the negotiation.

C. *Knowing When and How to Leave the Table*

The strongest power that a party on either side of the negotiation has, is knowing “when and how to leave the table.”³⁴ Getting large corporations to get to negotiation is a challenge in itself, but once you have them sitting across the table, both parties should be allowed to contribute evenly to the discussion. However, in class negotiations, absent class members are not able to make such decisions. So, how does a class representative know what the class would want to settle on? And how does he or she know when to walk away from a bad deal? Since class action settlements essentially bind all members of the class, even though “virtually none of the class members have agreed to it,”³⁵ the negotiator must express to the class members that a general solution may not necessarily be the *exact* solution to the specific interests of every single class member.³⁶

IV. **How to Negotiate a Class Action Suit – Techniques, Styles and Methods**

A. *Changing the Scope of Negotiation – Perception & Information Exchange*

To negotiate in a corporate society, where corporations control the law, and where individuals are given far less power, there must be a shift in the way disputes are handled.

³⁴ KRITEK, *supra* note 9 at 324.

³⁵ Federal Rule of Civil Procedure 23(c)(2)(B)(v).

³⁶ Under Federal Rule of Civil Procedure 23(c)(2)(B)(v), class members have the opportunity to exclude themselves from a class action certified under Rule 23(b)(3), and this “opt-out” right arguably constitutes tacit agreement.

Moving away from a corporate-controlled system, towards a system where all parties contribute to the outcome, requires a change in the techniques and approaches used during the negotiation. Changing the scope of negotiation requires a shift away from an uneven negotiating table to a process where class members do have a voice—to fix the issues, and to exercise their power. Just as negotiations come in many shapes and forms, the bargaining style of the negotiators must adjust to fit the different structures of negotiation. This hinges on a negotiator’s ability to evaluate the information at hand, and maintain his or her negotiating style accordingly, that is, “[the] conscious or subconscious choice of strategy for altering the other side’s perceptions.”³⁷

Although a negotiator must approach each negotiation on a case-by-case approach, “[a] negotiator need not adhere to a single style for all transactions nor even for the full course of a single transaction.”³⁸ Obtaining and weighing information, and knowing what information to exchange serves two tactical purposes: “[f]irst, by giving new information we provide the other side with a basis for reevaluating and thereby altering, its perception of its needs, costs, assessments, and alternatives, [and] [s]econd, by receiving new information we can reassess our own perceptions so as to increase the likelihood that they accurately reflect reality.”³⁹

B. Bargaining Style – The Right Approach & Proper Use

There are two styles of bargaining: competitive and cooperative. A competitive style of bargaining assumes the purpose of negotiation is to obtain the best possible economic result; typically at the expense of the other side,⁴⁰ while a cooperative style generates a greater mutual good, and considers the interests and perspectives of the other party.⁴¹ While these two styles of negotiation represent the boundaries of negotiation, there are various combinations of bargaining

³⁷ ALVIN L. GOLDMAN, *SETTLING FOR MORE: MASTERING NEGOTIATING STRATEGIES AND TECHNIQUES* 64 (1991).

³⁸ *Id.*

³⁹ *Id.* at 142.

⁴⁰ See Jay Folberg & Dwight Golann, *supra* note 5 at 53–57.

⁴¹ *Id.*

styles, which creates mixed-motive bargaining. Mixed motives are a part of most negotiations and are influenced by the interactions of multiple parties.⁴² In *Hinkley*, it would have been beneficial to start cooperative, in hopes to simulate a like response from PG&E, but remain cautious not to send a message that the community was willing to settle easily. Starting cooperative is advantageous in situations where the parties have prior relationships, and where the parties are dependent on the other, thus negotiating in order to save future dealings.⁴³

Negotiators must be keen to the way the other party is bargaining, and often need to match the moves that the other party makes. This is difficult when representing a class because the specific interests of class members may only be achieved if certain bargaining styles are implemented. However, if a class representative is able to match the style of a more competitive counterpart, while also upholding the interests of the class, this technique may show the other party that they are not weak and will not be easily exploited.⁴⁴ Regardless of the style implemented by the negotiator, clarity and flexibility are important. If both parties are willing to change course during the negotiation, both parties are more willing to change course *together*, and more likely to adjust their interests in accordance to the circumstances as they develop.

C. *Bargaining Style Used in Hinkley (Had Negotiation Taken Place)*

Looking back twenty-three years, we ask: what if negotiation had not been avoided?; what would have been the result had PG&E agreed to negotiation?; and how would that result have been achieved? PG&E, a large corporate powerhouse, likely would have been competitive, right? PG&E's counsel was willing to payout quickly and forget the harm they had caused; they were working with a *fixed* pie, and doled out a slice that seemed to satisfy the *temporary* interests of the residents. However, had PG&E listened to Hinkley's counsel, they would have been more

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See generally id.*

inclined to implement cooperative bargaining styles. Even though PG&E thought they satisfied the needs of Hinkley residents when the judge ordered a \$333 million settlement,⁴⁵ subsequent events have indicated otherwise. Had PG&E sought the best “joint solution,” and had they recognized how residents valued the matter, PG&E would not have had to spend nearly \$1 billion in cleanup and payouts to this day.⁴⁶

So now we ask, “what if PG&E would have cooperated?” and “what can we do to get them to cooperate today?” If PG&E focused on working with Hinkley residents, instead of against them, PG&E would have realized that their relationship was of significant value—that it trumped all other considerations—and the greater the likelihood a viable solution back then would have prevented issues from arising today.⁴⁷ Solving the *Hinkley* groundwater case today requires mutual framework, by establishing criteria that directly links the interests of Hinkley residents and PG&E. Combining each party’s interests requires the parties to change their focus away from past grievances towards future gains, and work towards a common goal. Building an image of a positive relationship between Hinkley and PG&E would allow the parties to start moving towards a less stressful future—one that has common value, such as improved living conditions, and a safer work environment.

D. *What can we learn from Hinkley?*

Based on the proceedings in *Hinkley*, we must start imagining new approaches to class negotiations, “choos[ing] to let go of traditional approaches to an uneven table, or at least

⁴⁵ Brockovich, *supra* note 1.

⁴⁶ *Id.* (PG&E paid out \$333 million on the first lawsuit. They paid out \$335 million on the second lawsuit, and roughly spent \$50 million in legal fees. They are under cleanup orders in Hinkley that could go on for another 100 years, which is going to cost them nearly \$100 million dollars, presently. Total, PG&E has racked up costs near \$1 billion dollars in claims and losses that they had to pay out. Had they just done the right thing, at the moment it happened, they would have saved lives, saved the environment, and saved the company.)

⁴⁷ *See id.* (discussing the need to convince Hinkley residents of the non-monetary values, as well as getting PG&E to take responsibility: ‘it’s easy. The community all wanted the same thing. They just wanted PG&E to respect them enough to take accountability for what they were doing; knowing that their actions could cost their children their lives.’ The minute PG&E had come in and, and was honest, transparent and showed respect to that community, the residents would have been willing to work with them. But it’s the deception that became the downfall.)

consider the possibility.”⁴⁸ We must recognize that “all negotiation tables are uneven to some degree, [and while] participants in the negotiation, including negotiators, may deny, ignore, distort, or suppress this fact to some degree,” it is up to the negotiators to make sure fairness is restored.⁴⁹ As Michael Moffitt noted, negotiators representing large classes must re-attack the problem—changing the formula of current negotiations, and make interests contingent on future relationships.⁵⁰ For example, negotiators can “craft attractive trades by establishing obligations that are contingent on a future uncertain event that affects each side’s valuation of the agreement,”⁵¹ and form agreements that “include variable terms, pegged to some benchmark to be measured in the future.”⁵² Negotiating future-oriented solutions “present an opportunity to create favorable incentives,”⁵³ but discussing more creative solutions requires clarity, as not to create more issues down the road.

The issue in *Hinkley* was the concern of creating a moral hazard, “a condition in which one party, under the terms of an agreement, may undetectably or uncontrollably behave in a way that is adverse to the other party.”⁵⁴ PG&E avoided negotiation because they had only focused on the economic ramifications, and approached the issue without regards for their own future. While “a contingent agreement [would not] represent *complete* finality, as at least some of the terms are yet to be determined,”⁵⁵ negotiation would change the perspective of PG&E, to be more mindful of the ways they had affected the surrounding community. In order for a

⁴⁸ KRITIK, *supra* note 5 at 156.

⁴⁹ *Id.* at 168.

⁵⁰ *Contingent Agreements: Agreeing to Disagree About the Future* 87 MARQ. L. REV. 691 (2004).

⁵¹ Folberg & Golann, *supra* note 5 at 152.

⁵² *Id.* at 153.

⁵³ *Id.*; See *supra* Part II, section A (discussing the components of negotiations and the need to incorporate solutions based on the three sides of the negotiating triangle).

⁵⁴ Folberg & Golann, *supra* note 5 at 153.

⁵⁵ *Id.*

contingent agreement to be appropriate in *Hinkley*, “the perceived benefit it captures for each negotiator must exceed the transition costs of discovering and implementing the agreement.”⁵⁶

V. Conclusion

A. Taking Responsibility – Apology and Forgiveness

The dispute in *Hinkley* is an ongoing issue, and has created turmoil for over twenty years. Since PG&E rejected all attempts at negotiation, their payout never gave Hinkley residents full closure of the matter. While justice was only partially served, many issues remained unresolved. The root of this unrest is because the parties reached an impasse,⁵⁷ and PG&E failed to take full responsibility. On the same hand, Hinkley residents were not willing to forgive PG&E entirely. In *Hinkley*, no one from PG&E stood up and said “we are sorry.” If they had admitted responsibility, which most would have expected them to do, they would then have simply needed to offer an apology,⁵⁸ which is far more valuable than repair and compensation; but no one stepped up. Just like the stalemate in *Hinkley*, negotiations remain open when parties do not take full responsibility for their actions, nor fix the underlying problem.⁵⁹ Admitting responsibility triggers apology and forgiveness and in turn, helps reframe or reopen negotiations.

Reopening the discussion of *Hinkley* today would require both parties to take responsibility—a two-part task: 1) requiring both parties to work together, to see the benefits of forgetting the past, and 2) moving forward. When disputants are able to forgive and forget, a social harmony is created, in order to keep the peace of the group, and generate understanding⁶⁰; an understanding that would require PG&E to engage in deep self-reflection and make a proper apology.⁶¹ Apology and forgiveness is only effective if the parties collaborate, and “explore the

⁵⁶ *Id.*

⁵⁷ *See generally Id.* at 139–55.

⁵⁸ *Id.* at 139.

⁵⁹ *See generally, id.*

⁶⁰ *Id.*

⁶¹ *Id.*

possibility of improving the outcome for both sides.”⁶² Using this cooperative approach offers closure, whether “focus[ing] on closing remaining economic gaps” or “look[ing] for agreement by attending to matters beyond money.”⁶³

When parties walk out of negotiation, as PG&E did, many issues remain unresolved. However, to bring closure to both parties, the closed door must be unlocked, which requires the parties to forget some of the issues; forget some of the miscommunications; and *reestablish* relationships. Opening the door to future negotiations is done with the “golden bridge.”⁶⁴ Shifting our perception of *Hinkley* will allow the parties to traverse this “bridge” and suggests that a lot more is possible if we reframe the public’s judgment of PG&E and large corporations in general. In *Hinkley*, apology and forgiveness requires a shift away from money-driven solutions, towards solutions that seal emotional and social wounds. While “it may be difficult to quantify the emotional and extrinsic factors . . . there are ways to satisfy emotional and social needs in a manner that creates value . . . an apology and its acceptance illustrates this point.”⁶⁵

B. The Future

To bridge this gap, we need to find better ways to negotiate—not to find a deal that can get industries off the hook; not a deal where attorneys can make another \$100 million; and not a deal where you have each community member getting a \$5 million pay-out. *Hinkley* and PG&E need to negotiate a deal that is win-win for everybody—one that transforms relationships, creates jobs and rebuilds the community. While this may not be full compensation for the past wrongs, “the community would get their lives back, PG&E would stay in town, and community members would keep their jobs—that’s what they want, and that’s what they deserve.”⁶⁶ So, it becomes a

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 149. See G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 185 (Penguin, 2006).

⁶⁵ *Id.* at 139.

⁶⁶ Brockovich, *supra* note 1.

win-win for everyone. But the way we are doing things now, is a win-win for nobody. A safe society costs us all, and if the scales are tipped unfairly, industries will continue to sweep their wrongful actions under the rug. We are so fearful about the past that we are not even looking at what is happening in this very moment. If we would get into the now, we can shape the future. The curveball is remaining focused and hyper-vigilant, even when one party makes you want to get up and leave the table. We are in a society that is continually changing, and so are the rules; but there is no need to play entirely by the rules. We need to create a solution for the future; one that provides justice for classes of individuals, and keeps the large corporations in check.⁶⁷

⁶⁷ *Id.* (discussing the future of negotiation, and the need for change).