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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT
 15 SAN FRANCISCO DIVISION

17 BERNARD PAUL PARRISH, HERBERT
 ANTHONY ADDERLEY, and WALTER
 18 ROBERTS III, on behalf of themselves and
 all others similarly situated,

19 Plaintiffs,

21 NATIONAL FOOTBALL LEAGUE
 22 PLAYERS ASSOCIATION, a Virginia
 corporation, and NATIONAL FOOTBALL
 23 LEAGUE PLAYERS INCORPORATED
 d/b/a PLAYERS INC, a Virginia
 24 corporation,

25 Defendants.

CIVIL ACTION NO. C07 0943 WHA

**PLAINTIFFS' MOTION IN LIMINE NO. 10,
 REQUESTING EXCLUSION OF EVIDENCE
 OF HOMAGES FOR GENE UPSHAW,
 INCLUDING THE "GU 63" BADGE WORN
 BY ACTIVE PLAYERS.**

Judge: Honorable William H. Alsup
 Date: October 15, 2008, 2:00 p.m.
 Place: Courtroom 9, 19th Floor

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2 **I. The Court Should Exclude Any Evidence, Testimony, Argument or Reference to any Homages to Gene Upshaw, Including the "GU 63" Badge Worn by Active Players**

3 As this Court is aware, Gene Upshaw recently passed away, unexpectedly, during the
4 pendency of this litigation. Mr. Upshaw served as executive director of the NFLPA for over
5 twenty years, played for the Oakland Raiders for fifteen seasons, and earned a spot in the Pro
6 Football Hall of Fame. After his death, there was an outpouring of sympathy for Mr. Upshaw's
7 family, including various homages from the sports and mainstream media regarding his career
8 playing football and his career with the NFLPA. *See, e.g.*, Garza Decl., Exs. A and B. During
9 the first week of the current NFL season, active players wore a black "GU 63" patch on their
10 jerseys, which represents Gene Upshaw's initials and jersey number with the Oakland Raiders.
11 *See* Garza Decl., Ex. C (photograph of Tony Romo, an active Dallas Cowboys player, taken at the
12 first game of the current NFL season, wearing a "GU 63" patch). Many of the in-game
13 announcers during that week acknowledged Gene Upshaw's death, provided highlights of Gene
14 Upshaw's football and NFLPA career, and expressed sympathy to his family and the broader
15 football community. The NFL has announced that, for the rest of the current season, most active
16 players will wear a "GU 63" decal on their helmets instead of the patch shown in Ex. C, while
17 Oakland Raider active players will continue to wear the "GU 63" patch.

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19
20 Gene Upshaw is an important figure in the instant lawsuit. As the longtime Executive
21 Director of the NFLPA, invariably, his statements and actions help establish that Defendants have
22 breached their contracts and fiduciary duties toward the Plaintiff class. It is entirely proper, then,
23 for Defendants to tell the jury of Gene Upshaw's passing, and to explain why Mr. Upshaw will
24 only testify at the trial by deposition.

25
26 It is improper, however, for Defendants to introduce evidence of the various homages that
27 were made following news of Mr. Upshaw's death. The eulogies of Mr. Upshaw do not clarify
28

1 any of the issues remaining in this lawsuit, constitute impermissible character evidence under
2 Rule 404, and will (many times) rely on hearsay. Additionally, introduction of this evidence may
3 confuse the issues, by shifting the focus from the actions of the Defendants' organizations to what
4 the public said or thought of the executive director of the NFLPA and Chairman of Players Inc.
5 Stated differently, Plaintiffs do not want Defendants to base their arguments on the life and
6 accomplishments of Gene Upshaw, rather than Mr. Upshaw's actions that are relevant and
7 probative to the issues remaining in the lawsuit. Because of the minimal probative value of these
8 homages, and their potential to confuse the merits of the remaining claims, they should be
9 excluded under Rule 403. The Court should additionally exclude any other improper argument
10 provided by the lawyers related to Mr. Upshaw's death, or any additional homages made by any
11 of Defendants' witnesses.
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14 **II. Conclusion**

15 Plaintiffs respectfully request that the Court grant its Motions in Limine.

16 Respectfully submitted,

17 Dated: 25 SEPT, 2008

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and National Football League Players Incorporated d/b/a Players Inc
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19 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION
20

21 BERNARD PAUL PARRISH, HERBERT
ANTHONY ADDERLEY, WALTER
ROBERTS III,

22 Plaintiffs,
23

24 v.

25 NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION and NATIONAL
FOOTBALL LEAGUE PLAYERS
26 INCORPORATED d/b/a PLAYERS INC,

27 Defendants.
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Case No. C 07 0943 WHA

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION IN LIMINE
NO. 10**

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ARGUMENT

In their Motion in Limine No. 10 (“Mot. No. 10”), Plaintiffs seek to exclude any “homages” to Gene Upshaw – the former longstanding executive director of the NFLPA and Chairman of Players Inc. – as well as “any other improper argument provided by the lawyers related to Mr. Upshaw’s death, or any additional homages made by any of Defendants’ witnesses.” Mot. No. 10 at 3. Plaintiffs concede that “[i]t is entirely proper . . . for Defendants to tell the jury of Gene Upshaw’s passing, and to explain why Mr. Upshaw will only testify at the trial by deposition.” *Id.* at 2.

Defendants are prepared to agree that they and their witnesses cannot refer to any “homages” to Mr. Upshaw, provided that Plaintiffs do not attack Mr. Upshaw’s credibility or character, such as by accusing him or the NFLPA under his leadership of disparaging or ignoring retired players, or taking money from retired players for his or the NFLPA’s personal benefit, as Plaintiffs have repeatedly done in this litigation. *See, e.g.*, Third Am. Compl. ¶ 39 (Nov. 15, 2007) (alleging that licensing revenues allegedly owed to the GLA Class members were “used to support the overhead, substantial salaries and perquisites” of Defendants and their employees).

If Plaintiffs attack Mr. Upshaw or his credibility or integrity, it would be grossly unfair to disarm Defendants in their response. *See* Fed. R. Evid. 608 (allowing for the character or credibility of a witness to be supported by evidence under certain circumstances); *Thomas v. Sheahan*, 514 F. Supp. 2d 1083, 1089 (N.D. Ill. 2007) (denying motion to exclude evidence supporting the character of defendants as it may be used under Federal Rule of Evidence 608); *Fresenius Med. Care Holdings, Inc. v. Baxter Int’l, Inc.*, C 03-01431 SBA (EDL), 2006 U.S. Dist. LEXIS 42159, *14 (N.D. Cal. June 12, 2006) (“Evidence is excluded on a motion in limine only if the evidence is clearly inadmissible for any purpose.”) (quotation omitted).

Plaintiffs’ Motion also should have no bearing on Defendants’ ability to refer to Mr. Upshaw’s career in the NFL and the NFLPA as background evidence in their case as is appropriate. Such background evidence is “universally offered and admitted as an aid to understanding.” *Ross v. City of Evanston*, No. 96 C 6042, 1998 U.S. Dist. LEXIS 5032, *7 (N.D. Ill. Apr. 13, 1998) (quoting Advisory Committee Notes, Fed. R. Evid. 401).

1 This motion is premature, since any references to Mr. Upshaw depend upon
2 Plaintiffs' own conduct in the trial. However, Defendants should not be permitted to attack the
3 integrity and credibility of Mr. Upshaw, and the NFLPA under his leadership, without giving
4 Defendants the opportunity to defend someone who will not be present in Court to defend
5 himself.

6 **CONCLUSION**

7 For all of the foregoing reasons, Defendants respectfully request that Plaintiffs'
8 Motion in Limine No. 10 be denied.

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10 Date: October 8, 2008

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