

1 Breach of Contract and Constructive Fraud claims and replaces [sic] them with ERISA’s Breach
2 of Fiduciary duty and California Insurance Discrimination Laws.” Plaintiffs’ Opposition Brief at

3 1. Plaintiffs also indicate that, “[a]t the appropriate time, Plaintiffs shall amend this action to
4 include California Unfair Business Practice (§17200 et seq.) and California Insurance Codes §§
5 790 et seq., 10144 et seq as well as Unruh [sic] Act via Civil Code § 51 claim, which fall under
6 ERISA’s savings clause, sparing them from exemption.” *Id.* In its reply brief, MetLife contends
7 that Plaintiffs’ proposed amendments would be futile and that leave to amend should be denied.¹
8 The briefing on the instant motions is complete, and pursuant to Civil Local Rule 7-1(b), the
9 Court has determined that the motion is appropriate for determination without oral argument.

10 “It is axiomatic that the complaint may not be amended by the briefs in opposition to a
11 motion to dismiss.” *Barbera v. WMC Mortgage Corp.*, No. C 04-3738 (SBA), 2006 WL
12 167632, at *2 n. 4 (N.D. Cal. Jan. 19, 2006), quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745
13 F.2d 1101, 1107 (7th Cir. 1984); *see also King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (Pro
14 se litigants must follow the same procedural rules as represented parties). Accordingly,
15 Plaintiffs’ proposed amendments are not now properly before the Court.

16 The Court has significant reservations as to whether some or all of Plaintiffs’ proposed
17 amended claims for relief against MetLife are viable. Among other things, it appears that the
18 proposed state law claims are preempted by ERISA and that David Merritt lacks standing to
19 assert any of the claims for relief alleged in the operative complaint or Plaintiffs’ opposition
20 papers. However, because the complaint is Plaintiffs’ first pleading that has been reviewed by
21 the Court and in keeping with the strong policy in the Ninth Circuit favoring amendment,
22 Plaintiffs will be granted leave to amend. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir.
23 1995).

24 IV. ORDER

25 Good cause therefor appearing, Defendant’s motion to dismiss is GRANTED, with leave
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27 ¹ The Court acknowledges receipt of Plaintiffs’ “Response to Defendants [sic] Reply
28 Brief” (“the Response”) and MetLife’s objections thereto. However, the Response has had no
affect on the Court’s determination of the instant motion.

1 to amend. Any amended complaint shall be filed within thirty (30) days of the date this order is
2 filed. The hearing date on the instant motion is hereby vacated and the case management
3 conference is rescheduled for May 7, 2010 at 10:30 A.M.

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6 **IT IS SO ORDERED.**

7 Dated: 3/1/2010

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9 JEREMY FOGEL
10 United States District Judge