

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1549**

David Richard Kostuch,
Appellant,

vs.

General Mills Inc.,
Respondent.

**Filed July 6, 2020
Affirmed
Bratvold, Judge**

Ramsey County District Court
File No. 62-CV-18-7417

David Richard Kostuch, St. Paul, Minnesota (pro se appellant)

Rachel C. Hughey, Merchant & Gould, P.C., Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge;
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges a district court order granting respondent's motion to dismiss the second amended complaint with prejudice. We determine that the second amended complaint does not state a claim upon which relief can be granted. In his brief to this court, appellant relies on evidence outside the record and raises issues for the first time on appeal.

Because the district court did not err in dismissing appellant's second amended complaint with prejudice, and because our review is limited to the appellate record and issues raised to and decided by the district court, we affirm.

FACTS

In November 2018, appellant David Kostuch served a summons and complaint on respondent General Mills Inc. The complaint included eight numbered and handwritten paragraphs, and alleged generally that “[t]he intellectual property that is being used is my trade secrets” and “the intellectual property that is being used is for cereals.” In response, General Mills moved for “a more definite statement that satisfies Minnesota’s pleading standards” and, if Kostuch failed to comply, sought dismissal of the case with prejudice. General Mills argued that it could not “respond to the vague and ambiguous allegations.”

In April 2019, Kostuch served General Mills with a second amended complaint,¹ alleging that “General Mills Inc. has intellectual property of mine that is illegally being used.” The second amended complaint alleges that General Mills “could have obtained” Kostuch’s trade secrets in six ways: (1) Kostuch’s brother was “in [his] home while [he] was inventing,” and that Kostuch’s partner “claimed to have seen him copying discs of [Kostuch’s] work”; (2) Kostuch’s brother “hung around someone with the first name, Donna then”; (3) “[a]ny other party could hack my computer”; (4) C.G., described as

¹ In January 2019, Kostuch filed a first amended complaint along with a request for waiver of service. General Mills has stated it never received the first amended complaint. Because Kostuch eventually served and filed a second amended complaint, and this was the basis for the district court’s decision to dismiss, we do not consider either the original or first amended complaint in this opinion.

Kostuch's childhood neighbor, "has stolen other trade secrets of mine, and, used them for car television shows"; (5) P.B., identified as Kostuch's acquaintance, "worked for General Mills Inc., in the past" at a "desk job," "at least until 1995," although Kostuch does not allege that P.B. took trade secrets; and (6) "[a] combination of these obtainable options here are possible, too." The complaint continues, "Beyond these, the law of fact is, they are using my trade secrets. No matter how obtained."

The second amended complaint alleges, "regardless of how my intellectual property that are trade secrets were obtained, from this list. Which does prove someone could have been in my home, and/or communicate[d] to someone at General Mills Inc." The second amended complaint also asserts that the National Intellectual Property Rights Coordination Center and the Federal Bureau of Investigation (FBI) have information about Kostuch's trade secrets. And the second amended complaint states that "the only way I will explain my trade secrets" is under a protective order and that "I am not going to release my trade secrets." Finally, the second amended complaint alleges that General Mills is "using my trade secrets, that if used were able to turn into the products listed in number eleven." Paragraph eleven runs about ten single-spaced pages and lists General Mills products, including soups, cereals, and frozen vegetables.

General Mills moved to dismiss the second amended complaint for failure to state a claim. Kostuch responded and argued, "I provided a claim upon which relief can definitely be granted." At a hearing, General Mills argued that the second amended complaint did not cure the deficiencies in the original complaint because Kostuch "hasn't sufficiently identified the trade secrets, and he has not plausibly stated a claim." Kostuch argued that

he was concerned about disclosing his trade secrets without a protective order in place. At the end of the hearing, the district court asked the parties to submit proposed findings. General Mills submitted proposed findings, but Kostuch did not.

The district court issued an order dismissing the second amended complaint with prejudice, concluding that Kostuch “has failed to plead sufficient facts for any of his claims such that he would be entitled to relief.” The district court determined the second amended complaint did not “provide fair notice of the theory on which [Kostuch]’s claim for relief is based” because Kostuch has not “identified his alleged trade secret(s)” or “even identified the type or nature of the secret information.” The district court also stated that Kostuch “confuses the requirement to plead a claim with sufficient specificity to put a defendant on notice of the claim with the later protections available when discovery of the actual details of the alleged trade secret information is sought.” Kostuch appeals.²

D E C I S I O N

I. The district court did not err in dismissing the second amended complaint.

A complaint “shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought.” Minn. R. Civ. P. 8.01. “Minnesota is a notice-pleading state and does not require absolute specificity in

² Kostuch moved in this court to supplement the appellate record with a third amended complaint. Kostuch also moved to seal the complaints. We denied Kostuch’s motion to supplement the record because Kostuch sought to introduce new evidence and a third amended complaint, neither of which had been filed in district court. We denied Kostuch’s motion to seal his original complaint and second amended complaint because he failed to file either pleading under seal in the district court, nor did he cite any legal authority authorizing this court to limit public access to these pleadings for the first time on appeal.

pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604-05 (Minn. 2014) (quotation omitted). “A plaintiff must provide more than labels and conclusions.” *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). A district court may dismiss a complaint when the plaintiff “fail[s] to state a claim upon which relief can be granted.” Minn. R. Civ. P. 12.02(e).

We review a district court’s decision to dismiss a complaint de novo. *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 831 (Minn. 2011). In reviewing an order to dismiss a complaint, we consider “only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” *Id.* (quotation omitted). A complaint will survive a motion to dismiss for failure to state a claim “if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Walsh*, 851 N.W.2d at 603. Generally, we look to the elements of a claim to determine whether a complaint fails to state a claim under Minn. R. Civ. P. 12.02(e). *See Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732, 747-48 (Minn. 2000) (affirming dismissal of claim because complaint did not “set forth with specificity the elements” of the claim).

The district court dismissed Kostuch’s second amended complaint because it failed to put General Mills on notice of his claim. The second amended complaint does not specify a cause of action, but states that General Mills is “illegally” using Kostuch’s intellectual property, specifically, his trade secrets. A claim for misappropriation of trade secrets requires the complaining party to show two elements: (1) the existence of a trade secret or

confidential information, and (2) the trade secret was misappropriated. *See Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897 (Minn. 1983).

Beginning with the first element, we consider whether the second amended complaint alleges the existence of a trade secret with sufficient information to notify General Mills of his claim. *See Walsh*, 851 N.W.2d at 605; *Electro-Craft Corp.*, 332 N.W.2d at 897. A trade secret is “information, including a formula, pattern, compilation, program, device, method, technique, or process” that “derives independent economic value . . . from not being generally known” and “is subject to efforts . . . to maintain its secrecy.” Minn. Stat. § 325C.01, subd. 5 (2018). Thus, a trade secret has three qualities: (1) information that (2) derives independent economic value and (3) is protected to maintain its secrecy.

The second amended complaint provides no information about whether Kostuch’s alleged trade secrets are a formula, method, or any other type of protected information. *See id.* Kostuch merely alleges that his trade secrets are “in a disc form” and in “a diary on paper,” but does not allege what kind of trade secrets are involved. The second amended complaint also does not describe the independent economic value of his trade secrets, nor does it allege any efforts taken to keep the information a secret. *See id.* Instead, the second amended complaint states that Kostuch wishes “to keep [his] trade secrets, trade secrets, exposing them to General Mills, Inc. removes [his] rights to them,” and that Kostuch will identify for the district court “each product” in which General Mills used his “trade secret(s)” so that the information “will continue to be trade secrets.” But this merely alleges that Kostuch wants to keep his trade secrets away from General Mills; it does not describe

Kostuch's efforts to "maintain [the trade secret's] secrecy." *See* Minn. Stat. § 325C.01, subd. 5.

We conclude that the second amended complaint does not allege any of the three qualities of a trade secret in a manner sufficient to notify General Mills of Kostuch's alleged trade secrets. On this basis alone, Kostuch has failed to state a claim for misappropriation of trade secrets. *See Electro-Craft Corp.*, 332 N.W.2d at 898-99 (stating that a party's "lack of clarity" and failure to "specify" what "design procedures" amounted to trade secrets was fatal to its misappropriation-of-trade-secrets claim (quotation omitted)).

Turning to the second element, we consider whether Kostuch's second amended complaint includes allegations sufficient to notify General Mills of misappropriation. Misappropriation is defined as "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means," *or* "disclosure or use of a trade secret of another without express or implied consent by a person who" (1) "used improper means" to acquire the trade secret, or (2) knew or had reason to know that "the discloser's or user's knowledge of the trade secret was" from a person who acquired it by improper means. Minn. Stat. § 325C.01, subd. 3 (2018). Thus, misappropriation means unauthorized acquisition, *and* disclosure or use of a trade secret.

General Mills argues that the second amended complaint does not state *when* General Mills allegedly misappropriated any of Kostuch's trade secrets, nor does it allege *how* General Mills allegedly disclosed or used Kostuch's trade secrets. *See id.* (defining misappropriation as improperly acquiring a trade secret or "disclosure or use of a trade

secret of another without express or implied consent”). We agree. Kostuch’s second amended complaint alleges that General Mills is illegally using his trade secrets, but does not allege from whom, where, when, or how General Mills appropriated even one trade secret. The complaint alleges six ways that General Mills “could” have obtained the trade secrets, but the allegations are hypothetical and vague. Without more facts, the second amended complaint fails to notify General Mills of Kostuch’s claim that it misappropriated trade secrets. *See Bahr*, 788 N.W.2d at 80 (affirming dismissal of a complaint because appellant failed to allege more than “labels and conclusions”).

Alternatively, Kostuch’s complaint fails to plead facts that show *how* or *when* General Mills disclosed *or* used the trade secrets. The second amended complaint does not allege that General Mills disclosed Kostuch’s trade secrets. While the second amended complaint alleges that “[General Mills] [is] using my trade secrets, that *if used* were able to turn into the products listed in number eleven,” no facts allege who used Kostuch’s trade secrets, or how, or when they were used. (Emphasis added.) Paragraph eleven contains a list of General Mills products spanning close to ten single-spaced pages. The list of products, without more, does not fairly notify General Mills of Kostuch’s claim. *Walsh*, 851 N.W.2d at 605 (stating that a plaintiff must provide “information sufficient to fairly notify the opposing party of the claim against it” (quotation omitted)).

Kostuch appears to believe that his option to seek a protective order under Minn. R. Civ. P. 26.03 relieves him of his obligation to give General Mills fair notice of his claim. Rule 26.03 provides, “Upon motion by a party or by the person from whom discovery is sought . . . the court . . . may make any order which justice requires to protect a party or

person” or order “that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.” But this rule only applies to discovery. Rules 8 and 12 require a plaintiff to plead sufficient facts that give fair notice to General Mills of his claim. *See* Minn. R. Civ. P. 8.01, 12.02(e).

Kostuch appears to argue that reversal is necessary because he can prove that General Mills manufactured products using his trade secrets. But Kostuch was required to include allegations in the complaint to “fairly notify” General Mills of what trade secrets are at issue, and how General Mills has misappropriated his trade secrets. *See Walsh*, 851 N.W.2d at 605. He failed to meet his burden. Even accepting the facts alleged as true and construing reasonable inferences in Kostuch’s favor, the second amended complaint lacks the facts necessary to notify General Mills of Kostuch’s claims. *See Park Nicollet Clinic*, 808 N.W.2d at 831 (stating appellate courts “construe all reasonable inferences in favor of the nonmoving party” when reviewing a district court’s dismissal of a complaint (quotation omitted)).

II. The district court did not err in dismissing the second amended complaint with prejudice.

Kostuch does not explicitly challenge the district court’s dismissal with prejudice, but implicitly raised this challenge in his request for reversal. General Mills argues that dismissal with prejudice was appropriate. We review a district court’s decision to dismiss a claim with prejudice for abuse of discretion. *Minn. Humane Soc. v. Minn. Federated Humane Soc’ys*, 611 N.W.2d 587, 590 (Minn. App. 2000). The district court considered the circumstances of the case, and “the policy of preventing harassment and unreasonable

delays in litigation,” and concluded that dismissal with prejudice was appropriate. The district court determined that General Mills did not have “sufficient notice” to “investigate [Kostuch’s] claims, prepare any defenses, or formulate a response,” and that Kostuch “failed to plead sufficient facts for any of his claims such that he would be entitled to relief.” This decision was well within the district court’s discretion. *See Martens*, 616 N.W.2d at 748 (dismissing a complaint with prejudice when allegations in the complaint did not establish a basis for a claim).

III. We do not consider matters outside the record on appeal.

Kostuch’s informal brief and addendum filed with this court contain information that does not appear in the district court record. Specifically, Kostuch’s informal brief includes the following: (1) two signed and notarized statements from Kostuch’s partner; (2) a statement by Kostuch about how to obtain his file from the National Intellectual Property Rights Coordination Center; and (3) ten photos with annotations. Kostuch’s addendum contains (1) written statements that are attributed to Kostuch; (2) an edited version of the motion hearing transcript that includes Kostuch’s comments; and (3) what appears to be the same list of food items in the second amended complaint, but with parentheticals after each item that Kostuch calls “identifiers” such as “method” and “invention.”³ General Mills argues that this court should disregard Kostuch’s new evidence. Kostuch responds that “[i]t is no[t] additional evidence, it is proof of evidence.”

³ As discussed above, Kostuch moved to supplement the record on appeal and asked that this court allow him to provide the list of food items with “identifiers” in the form of a third amended complaint. We denied his motion, but Kostuch still included the information in his addendum.

For two reasons, we decline to consider the new materials Kostuch attached to his informal brief and filed with the addendum. First, appellate review is limited to the pleadings, motions, and other materials filed with the district court. “The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.” Minn. R. Civ. App. P. 110.01. Generally, appellate courts will not consider evidence outside the appellate record. *See, e.g., Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (“An appellate court may not base its decision on matters outside the record on appeal.”); *Icenhower v. Total Automotive, Inc.*, 845 N.W.2d 849, 857 (Minn. App. 2014) (same), *review denied* (Minn. July 15, 2014).

Second, the issue in this appeal is whether the district court erred in its legal determination that the second amended complaint should be dismissed. But the second amended complaint does not refer to the new materials that Kostuch filed with his appellate brief. Kostuch argues that “[n]ow the claims to products from my 2nd Amended Complaint . . . are specifically identified with identifiers of my trade secrets to product claims as asked for.” But this court’s review of a rule 12 dismissal is limited to the “facts alleged in the complaint” and “constru[es] all reasonable inferences in favor of the nonmoving party.” *Park Nicollet Clinic*, 808 N.W.2d at 831 (quotation omitted). Our analysis under rule 12 examines the legal sufficiency of the complaint’s allegations, and assumes the allegations in the complaint are true, but we do not consider evidence that could be offered to prove the allegations.

For these reasons, it is inappropriate to consider the new materials attached to Kostuch's informal brief and included in his addendum and we have not considered any of them in deciding the merits of this appeal.

IV. We do not consider issues that Kostuch raises for the first time on appeal.

In his principal brief, Kostuch raises four issues that he did not raise during district court proceedings. Kostuch alleges “[t]he district court refused to answer any motion I had,” “[r]ules for trade secrets were never enforced,” and unregistered attorneys represented General Mills. Kostuch also alleges bias by both the district court judge who heard the motion and the judge who was originally assigned the case, but later recused himself. General Mills argues that there is no record evidence that the district court judges were biased and Kostuch's allegations are “entirely unfounded.” General Mills also argued that the four issues “were not made in the record below and were not alleged in either the Complaint or Amended Complaint.” Kostuch did not make these arguments while in the district court proceedings, and we do not generally consider issues raised for the first time on appeal. *Thiele*, 425 N.W.2d at 582. Thus, we decline to consider the four issues raised for the first time in Kostuch's principal brief.

Kostuch also raises issues for the first time in his reply brief, including arguing that the district court failed to contact the FBI and National Intellectual Property Rights Coordination Center and “refuse[d] my right to Due Process of Law of a trial.” Generally, appellate courts “decline[] to consider issues raised for the first time in a reply brief.” *State v. Ali*, 895 N.W.2d 237, 247 n. 9 (Minn. 2017) (quotation omitted); *see also* Minn. R. Civ.

App. P. 128.02, subd. 4 (“The reply brief must be confined to new matter raised in the brief of the respondent.”). As a result, we decline to address the new issues raised in Kostuch’s reply brief.

Affirmed.