

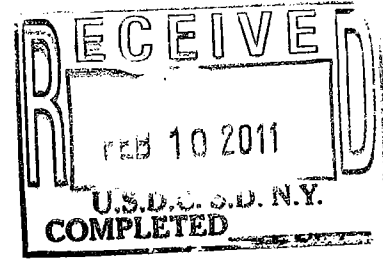
JUDGE SULLIVAN

11 CV 0938

RONALD L. ISRAEL
NANCY A. DEL PIZZO
Wolff & Samson PC
140 Broadway, 46th Floor
New York, NY 10005
973-325-1500

Attorneys for Plaintiff
Graffiti Bistro & Bakery, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



GRAFFITI BISTRO & BAKERY, INC.,

Plaintiff,

v.

JESUS NUNEZ RABANO
and GRAFFIT USA, LLC,

Defendants.

Case No.: 1:11-cv-00938(RJS)(KNF)

ECF CASE

**COMPLAINT ALLEGING COMMON
LAW SERVICE MARK INFRINGEMENT
AND UNFAIR COMPETITION**

Jury Trial Demanded

The Plaintiff Graffiti Bistro & Bakery, Inc. (hereinafter "Plaintiff"), by and through its undersigned attorneys, for its complaint against the defendants, alleges as follows:

NATURE OF ACTION

1. This is an action for service mark infringement, unfair competition and other relief arising under the trademark and service mark laws of the United States, specifically 15 U.S.C. § 1051 *et seq.* (hereinafter "Lanham Act") and the common law of the State of New York.

THE PARTIES

2. Plaintiff is a corporation organized and existing under the laws of the State of New York with its principal place of business located at 224 East 10th Street, New York, New York 10003.

3. Upon information and belief, the defendant Jesus Nunez Rabano (“Nunez”) is an individual residing at 255 W. 10th Street, New York, New York 10014, with a principal place of business located at 141 West 69th Street, New York, New York 10023.

4. Upon information and belief, the defendant Graffit USA, LLC (“GUL”) is a limited liability company organized and existing under the laws of the state of New York with a principal place of business located at 141 West 69th Street, New York, New York 10023 (Nunez and GUL shall hereinafter be collectively referred to as “Defendants.”)

5. Upon information and belief, Defendants have and continue to offer restaurant services that infringe upon and unfairly compete with Plaintiff’s common law service mark **GRAFFITI**.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338 because Plaintiff’s claims arise under the trademark and service mark laws of the United States. This Court also has supplemental jurisdiction pursuant to 28 U.S.C. §§ 1338(b) and 1367 over Plaintiff’s claims that arise under the laws of the State of New York.

7. This Court has personal jurisdiction over the parties to this action because (i) Plaintiff’s claims arise in this judicial district, and (ii) each party is located within and does business in this judicial district.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Plaintiff’s claims arise in this judicial district, each party does business in this judicial district, witnesses and evidence are located within this judicial district, and the acts complained of herein have taken place in this judicial district.

PLAINTIFF’S GRAFFITI RESTAURANT

8. Plaintiff owns and operates the popular and well-known restaurant **GRAFFITI** located in the East Village neighborhood of Manhattan. Plaintiff has been providing its

restaurant services under the mark **GRAFFITI** since at least as early as September, 2007. Printouts from Plaintiff's web site located at www.graffitinyc.com, which demonstrate Plaintiff's use of its **GRAFFITI** mark are attached hereto as **Exhibit A**.

10. The principal of Plaintiff, and the head chef at **GRAFFITI**, is Jehangir Mehta. Mr. Mehta is a prominent and well-known New York City-based chef who was the runner-up on the second season of the hit television program The Next Iron Chef in 2009. Mr. Mehta has appeared on numerous nationally televised television programs, including the Martha Stewart show as well as several programs on The Food Network. Mr. Mehta's recipes have been featured in such well known magazines as Vogue and The New Yorker, as well as many food-related publications. Mr. Mehta's prominence as a celebrity chef has dramatically raised the public awareness and goodwill of Plaintiff's **GRAFFITI** restaurant, as the restaurant attracts consumers and diners from all over the New York City area and elsewhere throughout the United States.

11. Plaintiff's **GRAFFITI** restaurant is tremendously popular and has received much critical acclaim since opening in 2007. For example, **GRAFFITI** was ranked among the top ten restaurants in New York City in 2007 by CitySearch. **GRAFFITI** features a menu of small tasting plates that combine Mr. Mehta's unique food combinations and ingredients with an international theme.

12. Plaintiff is the owner of United States Service Mark Application Serial No. 85/201,501 for its **GRAFFITI** mark in Class 43 for restaurant and bar services. A printout from the United States Patent and Trademark Office's Online Database of Plaintiff's application is attached hereto as **Exhibit B**.

13. Plaintiff has invested a substantial amount of time, money and other resources advertising, promoting, marketing and publicizing its services provided under its **GRAFFITI**

mark. As a result of Plaintiff's substantial advertising, marketing and promotional efforts, its **GRAFFITI** mark has acquired substantial consumer recognition and good will. Plaintiff's mark has become an important source indicator which identifies the quality services provided by Plaintiff and Mr. Mehta. For all of the foregoing reasons, the **GRAFFITI** mark is an exceedingly valuable asset of Plaintiff.

14. By virtue of Plaintiff's extensive use of the mark **GRAFFITI**, the mark has developed significant consumer recognition and good will. The mark **GRAFFITI** has come to be widely recognized by the public as identifying Plaintiff and its restaurant services.

DEFENDANTS' INFRINGEMENT

15. Subsequent to Plaintiff's substantial use of its **GRAFFITI** mark, and subsequent to Plaintiff's mark acquiring public recognition as identifying and distinguishing Plaintiff's restaurant services from the restaurant services of others, Defendants opened a "graffiti-themed" restaurant in Manhattan under the virtually identical and confusingly similar name and mark "Graffit." Upon information and belief, Nunez is also a prominent chef who is well-known in the restaurant world.

16. Specifically, in December, 2010 Defendants opened their restaurant under the virtually identical name and mark "Graffit" on the Upper West Side of Manhattan, approximately 4 miles away from Plaintiff's restaurant.

17. Defendants' restaurant services provided at "Graffit" are virtually identical to Plaintiff's restaurant services and are directed towards the same class of consumers, such that Plaintiff and Defendants are unquestionably in competition with respect to those services.

18. The respective restaurants are themselves highly similar in nature, as both feature small, internationally themed tasting plates that incorporate unique food combinations

and unusual ingredients. By way of example, Mr. Mehta has for many years utilized “Pop Rocks ®” candy in a signature dish that he featured on the Iron Chef television show and in his **GRAFFITI** restaurant. Plaintiff learned, as the result of an interview given by Nunez with the publication the Huffington Post, that Defendants also planned to utilize this extremely obscure ingredient in a dish to be served at “Graffit.”

19. Defendants’ use of the mark “Graffit” is so similar to Plaintiff’s **GRAFFITI** mark that it is likely to cause confusion, mistake or deception as to the source or origin of Defendants’ services. As a result of Defendants’ use of the virtually identical mark in connection with virtually identical services, consumers are likely to believe that Defendants’ services are provided by, or sponsored by, or approved by, or licensed by, or affiliated with or in some other way legitimately connected to Plaintiff.

20. Not only is confusion likely, but in fact instances of actual confusion have already taken place. For example, Plaintiff’s restaurant has received phone calls from customers looking for Plaintiff’s restaurant while standing outside of Defendants’ restaurant. In addition, a third party online preview from the web site Goodiesfirst.com of Defendants’ restaurant already contemplates that consumers will be confused, as it specifically mentions Plaintiff’s **GRAFFITI** restaurant in discussing the upcoming opening of Defendants “Graffit” restaurant. A printout from www.goodiesfirst.com of the aforementioned article is attached hereto as **Exhibit C**.

21. The acts of Defendants complained of hereinabove are unlawful, willful and knowingly performed with the intent and result of injuring Plaintiff.

PLAINTIFF'S NOTICE TO DEFENDANTS

22. Soon after Plaintiff learned about the opening of Defendants' restaurant, counsel for Plaintiff sent a cease and desist letter dated December 22, 2010 to Nunez, demanding that Defendants cease and desist from using the service mark "Graffit" in connection with their restaurant services.

23. Upon information and belief, Defendants have failed to comply with any of the demands set forth in Plaintiff's aforementioned letters, and continue to provide restaurant services under the confusingly similar mark "Graffit."

COUNT I

UNFAIR COMPETITION UNDER SECTION 43(a) OF THE LANHAM ACT

24. Plaintiff repeats and reallages each and every allegation contained in Paragraphs 1-23 of the Complaint as though fully set forth herein.

25. Defendants, through their conduct as described above, are providing services under a colorable imitation of Plaintiff's protectable **GRAFFITI** mark, which is likely to cause confusion or mistake and/or to deceive in violation of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)).

26. Defendants have committed such acts of false designation of origin and false description and representation willfully and with full knowledge of Plaintiff's prior use of, and rights in, its **GRAFFITI** mark.

27. As a result of Defendants' acts of unfair competition, Plaintiff has suffered and will continue to suffer serious and irreparable harm for which there is no adequate remedy at law.

COUNT II

COMMON LAW TRADEMARK AND SERVICE MARK INFRINGEMENT AND UNFAIR COMPETITION

28. Plaintiff repeats and reallages each and every allegation contained in Paragraphs 1-27 of the Complaint as though fully set forth herein.

29. Defendants' aforesaid acts constitute infringement of Plaintiff's rights in its common law service mark **GRAFFITI** and tend to falsely describe or represent that Defendants' restaurant services are provided by, or sponsored by, or approved by, or licensed by, or affiliated with or in some other way legitimately connected to Plaintiff and are of the same character, nature and quality as the restaurant services of Plaintiff, thereby damaging Plaintiff and Plaintiff's reputation.

30. The acts of Defendants complained of hereinabove constitute acts of unfair competition against Plaintiff under the laws of the United States including Section 43(a) of the Lanham Act and the common law of the State of New York, which acts have been committed knowingly and willfully and have injured Plaintiff in its trade and business.

31. By reason of the aforesaid acts, Defendants have caused damage to Plaintiff and to the goodwill associated with Plaintiff's mark.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment in its favor and against Defendants as follows:

1. That Defendants, and their officers, agents, servants, distributors, affiliates, employees, attorneys and representatives and all those in privity or acting in concert with the Defendants, and each of them, be permanently enjoined and restrained from, directly or indirectly:

(a) Using the confusingly similar mark "Graffit," or any other marks confusingly similar thereto, alone or in combination with other words, names, styles, titles, designs or marks in connection with the provision of restaurant services;

(b) Using in any other way any other marks or designations so similar to Plaintiff's aforesaid **GRAFFITI** mark as to be likely to cause confusion, mistake or deception;

(c) Falsely designating the origin, sponsorship, or affiliation of the Defendant's services in any manner;

(d) Otherwise competing unfairly with Plaintiff in any manner;

(e) Using any words, names, styles, designs, titles, designations, or marks which create a likelihood of injury to the business reputation of Plaintiff and the goodwill associated therewith;

(f) Using any trade practices whatsoever including those complained of herein, which tend to unfairly compete with or injure Plaintiff's business and goodwill pertaining thereto; and

(g) Continuing to perform in any manner whatsoever any of the acts complained of in this complaint.

2. That the Defendants be required to pay to Plaintiff compensatory damages for the injuries sustained by Plaintiff in consequence of the unlawful acts alleged herein and that such damages be trebled pursuant to 15 U.S.C. § 1117 because of the willful and unlawful acts as alleged herein.

3. That the Defendants be required to account for and pay over to Plaintiff all gains, profits and advantages derived by them from the unlawful activities alleged herein.

4. That Defendants be required to deliver for destruction all stationary, signs, advertisements, promotional flyers, cards, brochures, menus, promotional materials and any

other written materials which bear the trademark or service mark "Graffit" together with all plates, molds, matrices and other means and materials for making or reproducing the same.

5. That the Defendants be required to pay to Plaintiff all of its litigation expenses, including but not limited to reasonable attorneys fees and the costs of this action.

6. That Plaintiff be awarded such other and further relief as the Court may deem just and proper.

WOLFF & SAMSON PC
140 Broadway, 46th Floor
New York, NY 10005
973-325-1500

*Attorneys for Plaintiff
Graffiti Bistro & Bakery, Inc*

By: 

RONALD L. ISRAEL

Dated: February 9, 2011
New York, New York

DEMAND FOR JURY

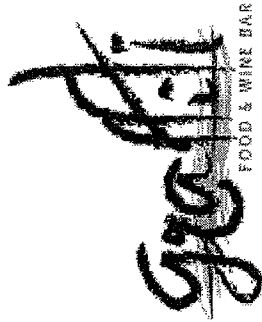
Plaintiff hereby demands a jury as to all issues triable to a jury.

WOLFF & SAMSON PC
140 Broadway, 46th Floor
New York, NY 10005
973-325-1500
Attorneys for Plaintiff
Graffiti Bistro & Bakery, Inc.

By: _____


RONALD L. ISRAEL

Dated: February 9, 2011
New York, New York



224 EAST 10 STREET NYC 10003
212.677.0695 | 212.464.7743

tues & sun 5.30pm - 10.30pm
wed to sat 5.30pm - 11.45pm



food

wine

events

chef

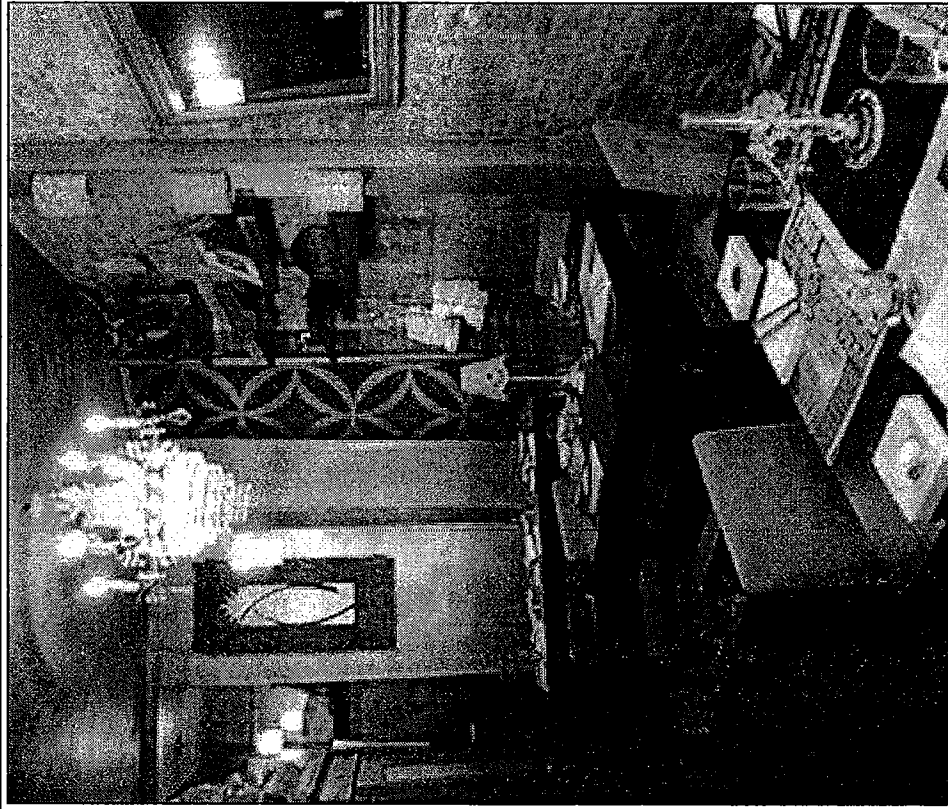
press

MARATHA

THE MARTHA STEWART SHOW

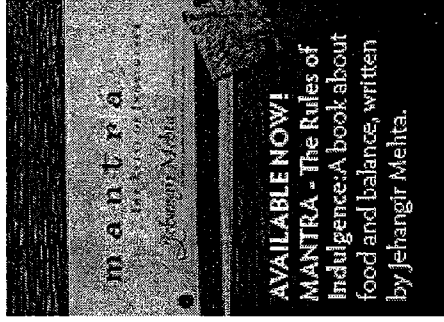
Watch Chef Jehangir Mehta
take Martha Stewart
behind the scenes
of Graffiti Food & Wine Bar
on the Martha Stewart Show.

Original Air Date - Jan 26, 2009
Repeat - July 28, 2009



Oprah's search for
the Next TV Star:

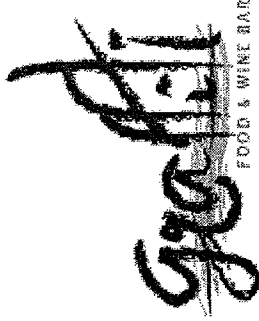
VOTE JEHANGIR!



Arguably one of the country's most celebrated pastry provocateurs, Jehangir Mehta has pushed palates - with his deliriously avant-garde creations at Jean Georges and Aix. Now, he branches out with this sweet-and-savory spot in the East Village, an eclectic shoebox-size boîte which he designed himself. Mehta will be serving up equally eclectic, international small plates that will feature his trademark affinity for bold flavors and spices such as chilies, sambhar, tumeric and star anise.

**Get the inside scoop on
The Next Iron Chef
www.jehangirmehta.com**

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224 EAST 10 STREET NYC 10003
212.677.0695 | 212.464.7743

tues & sun 5.30pm - 10.30pm
wed to sat 5.30pm - 11.45pm

food

\$ SEVEN

- GREEN MANGO PANEER
- THREE CHEESES
- PROSECCO LYCHEE MARTINI

wine

events

chef

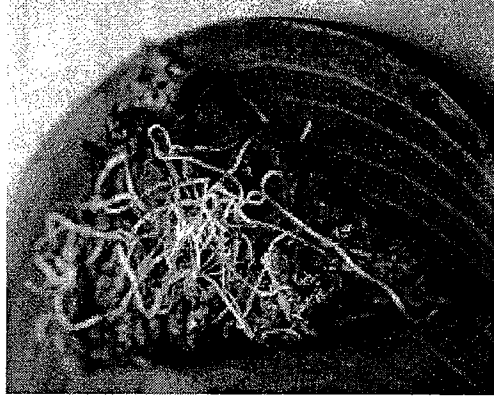
\$ TWELVE

- WATERMELON FETA SALAD, MINT SORBET
- CHILI PORK DUMPLINGS, GRAPEFRUIT CONFIT
- ZUCCHINI HUMMUS PIZZA
- PICKLED GINGER SCALLOPS, CANDIED RED CHILI
- FOIE GRAS RASPBERRY CROSTINI, WALNUT SALAD

press

\$ FIFTEEN

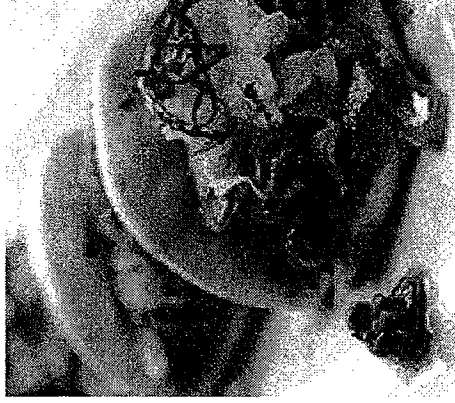
- GRAFFITI BURGER, GARLIC FINGERLING POTATOES, CHIPOTLE MAYONAISE
- BRAISED PORK BUNS, APRICOT CHUTNEY
- GREEN CHILI SHRIMP, MIRIN DAIKON MOONG SALSA
- CHICKPEA CRUSTED SKATE, MINT YOGURT SAUCE
- DUCK PORTOBELLO GRATINEE, MUSTARD ONION CONFIT
- CUMIN EGGPLANT BUNS, THYME FENNEL RELISH

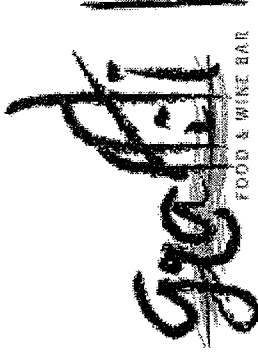


\$ SEVEN

- HAZELNUT CHOCOLATE CAVIAR CUPCAKE, CHOCOLATE CHIP ICE CREAM
- COCONUT MACARON, DULCE DE LECHE
- WARM TRUFFLE ALMOND STRAWBERRIES, PEPPER ICE CREAM

We tailor our menu for Vegetarians and Gluten-free diet





224 EAST 10 STREET NYC 10003
212.677.0695 | 212.464.7743

tues & sun 5.30pm - 10.30pm
wed to sat 5.30pm - 11.45pm

food

wine

events

chef

press

CitySearch New York - Top 10 Restaurants 2007

New York Magazine, September 3-10, 2007

New York Times, June 20, 2007

New York Times, September 5, 2007

New York Times, September 19, 2007

Time Out New York, September 20-26, 2007

New York Post, September 2007

Daily Candy, September 2007

Rare Daily, September 2007

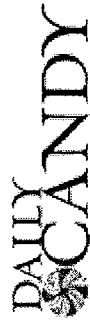
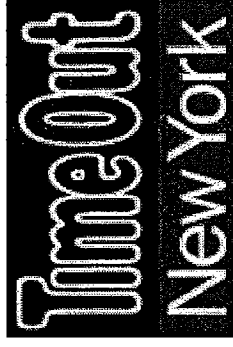


Exhibit B



United States Patent and Trademark Office

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GRAFFITI

Word Mark	GRAFFITI
Goods and Services	IC 043. US 100 101. G & S: Restaurant and bar services. FIRST USE: 20070900. FIRST USE IN COMMERCE: 20070900
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85201501
Filing Date	December 20, 2010
Current Filing Basis	1A
Original Filing Basis	1A
Owner	(APPLICANT) GRAFFITI, BISTRO & BAKERY, INC. CORPORATION NEW YORK 224 E. 10TH STREET New York NEW YORK 10003
Attorney of Record	Peter Nussbaum
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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Exhibit C

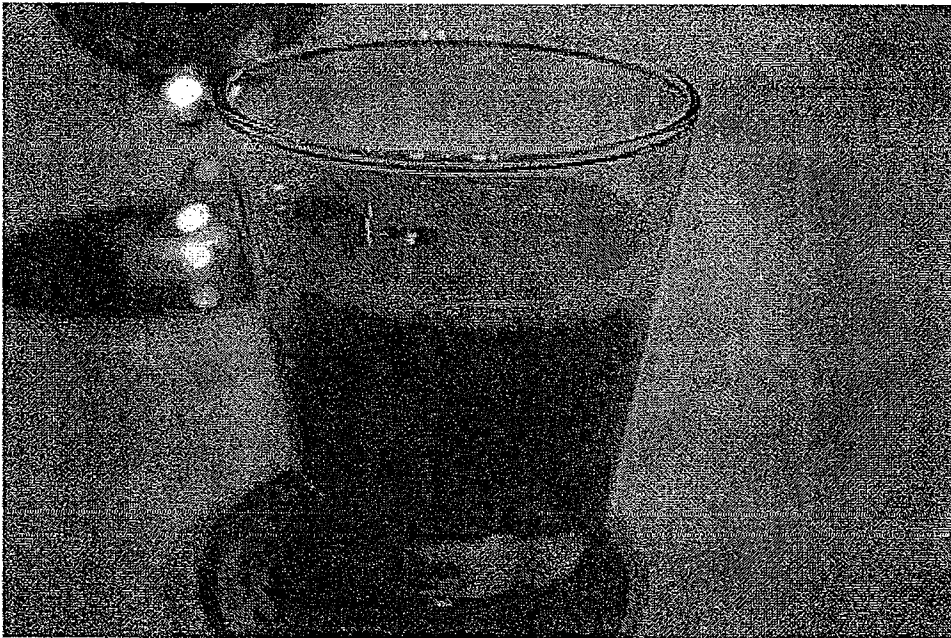
Goodies First

Preview: Graffit

There's still a lot of hubbub surrounding Spanish food (or have we moved on to Scandinavia?). Yet, for such a *de moda* cuisine, there are many swaths of the city lacking a single Spanish restaurant, modern or traditional. I can't believe it took until last week for South Brooklyn to get a tapas bar (no, La Mancha doesn't count).

Maybe I'm geographically biased, but the dining diversity on the Upper West Side has always felt a bit bleak. That's why it's surprising that Spanish chef, Jesús Nuñez, has decided to open his first New York restaurant on W. 69th Street. Known for deconstructions, playful presentations...and a penchant for graffiti art (hence, the name, not to be confused with Jehangir Mehta's Graffiti) hopefully his vision will translate in this staid neighborhood.

This is a preview of what Graffit will be serving when they open in November. As this dinner was hosted at Compass, chef Milton Enriquez contributed dishes, as well. Free food clouds one's judgment so this is by no means a review. Just the facts. I will say that I would likely return on my own. Mercat, Txikito, Casa Mono and countless other tapas bars are justifiably popular, but I would say that we haven't had a creative full-on Spanish restaurant since Urcña.



Sangria in Six Textures