APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. **8:13-CR-406 (MAD)**

STACIE DEMERS,

Defendant.

APPEARANCES: **OF COUNSEL:**

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Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

In an Indictment dated October 23, 2013, Defendant Stacie Demers, along with six other individuals, was charged with conspiracy to possess with the intent to distribute and to distribute a controlled substance in violation of Title 21, United States Code, Sections 841(a)(1) and 846, involving 1,000 kilograms or more of a mixture and substance containing a detectable amount of Marijuana, a Schedule 1 controlled substance, in violation of Title 21, United States Code, Section 841(b)(1)(A). *See* Dkt. No. 1 at 1-2. Defendant Demers was also charged in the

Indictment with aiding and abetting the offense of possession with intent to distribute a controlled substance, in violation 21 U.S.C. § 841(a)(1) and (b)(1)(D) and 18 U.S.C .§ 2(a). *See id.* at 2.

Defendant's trial commenced on January 19, 2016. *See* Dkt. No. 212. On January 21, 2016, the jury returned a guilty verdict as to both counts. *See* Dkt. No. 219.

Currently before the Court is Defendant Demers' motion for a new trial on Count 1 of the Indictment. *See* Dkt. No. 225.[1]

II. BACKGROUND

At trial, the Government presented evidence establishing that, over the course of about ten years, Defendant conspired with her father, Lee Smith, her siblings, Shane Smith, Jody Smith, and Steven Brand, and several other individuals to smuggle thousands of pounds of marijuana from Canada into the United States. Once the marijuana crossed the border from Canada to Lee Smith's farm in the United States, it was generally stored with Lee Smith's children, including Defendant Demers, who stored the marijuana in a shed attached to her home. Thereafter, the marijuana was picked up by drivers who delivered it in loads of hundreds of pounds at a time to customers throughout the eastern United States.

At trial, five of Defendant Demers' coconspirators testified, including Ralph Dumas, Archie Rafter, Paul Southworth, Timothy Fleury, and James McLernon. Defendants Dumas and Southworth both testified that they regularly picked up loads of marijuana from Defendant Demers, Shane Smith and Steven Brand, ranging from four-to-six, and occasionally up to eight, hockey bags filled with thirty-to-fifty pounds of marijuana each. Defendant Rafter testified to the

[1] Defendant does not seek a new trial on Count 2, the aiding and abetting charge, admitting that the "government offered recordings and video of the defendant's activities in 2013 which were strongly inculpatory." Dkt. No. 225 at 4.

Canadian side of the operation and explained how the marijuana crossed the border from Canada to Lee Smith's farm on ATVs, snowmobiles, and farm equipment operated by Andrew Scheuppel. Further, Defendant Rafter testified how he coordinated with Defendant Dumas and Andrew Scheuppel to schedule deliveries of marijuana and money. Defendant Fleury discussed his experience transporting marijuana as part of the conspiracy and testified about moving thirty-three hockey bags of marijuana from Lee Smith's farm to a shed on Defendant Demers' property. Finally, Defendant McLernon testified to receiving and planning to distribute a load of marijuana that came directly from Defendant Demers' shed.

The Government also introduced evidence of two marijuana seizures tied to Defendant Demers and Lee Smith. The first seizure, in November of 2010, took place on Lee Smith's farm. The second seizure, in July of 2013, involved a load of marijuana stored in Defendant Demers' shed. The second seizure was recorded in both video and audio. In the recording, Defendant Demers discussed picking up bags of marijuana from a field with her brother, Shane Smith, and commented on how heavy the bags were. The jury also heard Defendant Demers discuss smuggling and distributing marijuana in other recorded conversations with Defendants Dumas and Lee Smith. In those recordings, Defendant Demers and her father made reference to other members of the conspiracy – Scheuppel, Dumas, and Southworth – and to seeking payment for their parts in the conspiracy.

Special Agent ("SA") Hermes was the Government's final witness. He testified to, among other things, Defendant Demers' post-arrest statement on November 5, 2013. *See* Dkt. No. 233-1. When first asked about the statement, SA Hermes testified as follows:

> The defendant stated that in the '90s she met Bob, Pivan's Restaurant in Huntington, Quebec, and it was agreed that marijuana would be transported to her house and then the defendant would then take the marijuana to one of a few locations around the area.

> The defendant stated that the bag weighed approximately 50 pounds and she did this for about eight to ten years and they did about one bag a week.

Dkt. No. 233-1 at 18-19.[2] At this point, defense counsel objected to the question and answer, and, at sidebar, argued that "it appears to be testimony relating to criminal activity that's not charged under this indictment, and I believe the only purpose of that testimony will be to demonstrate the criminal propensity of my client." *Id.* at 19. Defense counsel twice requested that "the Court give a curative instruction that they should disregard that testimony" and that the testimony should be stricken. *Id.* at 19-20.

Once the jury was excused, the Court asked for defense counsel's input as to an appropriate curative instruction. *See id.* at 22-23. In response, Mr. Hyde argued as follows:

> . . . at this point I'm kind of concerned that – that it's not going to be possible to have a sufficiently curative instruction and that's just because basically the government has just branded my client as a drug dealer and I don't – I didn't anticipate that was going to be the first answer out of the agent's mouth. The question was what did she say? There wasn't any disclosure, which I believe is required under Rule 16, of the intention to use a prior bad act in this regard. So, I just – I'm kind of – I'm nonplussed and I'm learning – I guess if there's going to be a – the closest we can come to a curative instruction would be that the jury – the question should not have been asked, it was inappropriate, and the jury should entirely disregard the question and the answer and I would ask that that be delivered to the jury in the strongest possible terms.
>
> I don't want to ask for a mistrial, your Honor, because I'm – I think that in a lot of regards, you know, we're satisfied with the way the evidence has gone in in the case but it's – certainly damaging, there's no question about it, and I really have some concerns about that.

Id. at 23-24.

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[2] To avoid confusion, any time that the Court cites to a page number for a document in the record, the Court will cite to the page number generated by the Court's electronic filing system.

After receiving the Government's position, the jury returned and were instructed as follows:

> Members of the jury, before the break, Special Agent was asked this question, "What if anything did the defendant say after she waived her Miranda rights?" and he gave an answer. My preliminary instructions to you you'll probably remember I told you that if I instruct you to strike something from your minds, you must. I am instructing you to strike from your minds and from any consideration in this case the answer that the special agent gave. You may not consider that. I know it's hard to remove things from your brain but I'm instructing you that the answer is stricken and you must not consider that answer in this matter.

Dkt. No. 233-1 at 26.

Thereafter, SA Hermes informed the jury about Defendant Demers' alleged admission to smuggling marijuana (during the time period relevant to the Indictment) and storing it in her shed for more than a decade. *See id.* at 27-28. Specifically, Agent Hermes testified that Defendant Demers admitted to the following: (1) "Andrew [Schueppel] work[ed] with them and that he uses his four-wheeler to transport marijuana to – [w]hat she calls the little garage, which is an addition on her house;" (2) that Defendant Demers would unlock the "little garage" when she was expecting a marijuana delivery; (3) Schueppel delivered 2 to 3 and up to 4 bags of marijuana weighing approximately 50 pounds apiece, twice per week; (4) these loads were then picked up by "Hay Man or Teddy Bear" (Dumas); (5) she was paid $1,000 per bag; and (6) that her brother Shane had been involved with the conspiracy for approximately seven-to-ten years, "kind of in the same role as her." *Id.*

Following SA Hermes' testimony, the Government rested and Defendant did not present a case. The jury ultimately returned a verdict finding Defendant guilty of conspiring to possess with intent to distribute 1,000 kilograms or more of marijuana and aiding and abetting the possession of marijuana with intent to distribute.

III. DISCUSSION

Federal Rule of Criminal Procedure 33(a) provides, in pertinent part, that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a); *see also United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001) (citation omitted). "A motion for a new trial on the ground that the verdict is contrary to the weight of the evidence raises issues different from those involved in a motion for a judgment of acquittal based on the sufficiency of the evidence." *United States v. Nalbandian*, No. 3:08-CR-60, 2009 WL 5218056, *5 (D. Conn. Dec. 29, 2009) (citing *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985)). When reviewing a Rule 33 motion, a district court has "broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992). Though a district court is entitled to "'weigh the evidence and in so doing evaluate for itself the credibility of the witnesses,' . . . it 'must strike a balance between weighing the evidence and credibility of witnesses and not "wholly usurp[ing]" the role of the jury.'" *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 159 (2d Cir. 2008) (internal quotations omitted).

Accordingly, a court should exercise its discretion under Rule 33 with caution and with due respect for the jury's verdict. *See id.* Therefore, as the Second Circuit has explained,

> [t]he ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. . . . The trial court must be satisfied that "competent, satisfactory and sufficient evidence" in the record supports the jury verdict. . . . The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. . . . "There must be a real concern that an innocent person may have been convicted." . . . Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33

> authority "sparingly" and in "the most extraordinary circumstances."

Ferguson, 246 F.3d at 134 (internal quotations and citation omitted).

In her motion for a new trial as to Count 1, the conspiracy charge, Defendant Demers argues that SA Hermes' testimony concerning her post-arrest admission to smuggling marijuana beginning in the 1990s was offered "to demonstrate her criminal propensity" in violation of Rule 404(b) of the Federal Rules of Evidence. *See* Dkt. No. 225 at 4. Defendant Demers admits that the recordings and video of her activities in 2013 were "strongly inculpatory" as to the aiding and abetting count. *See id.* However, as to Count 1, Defendant Demers contends that,

> whether the conspiracy alleged in count 1 of the indictment – which according to the government existed continuously from 2004 to 2013 – actually came to an end in 2010 and whether the defendant was involved in that conspiracy prior to the cessation of its operations in 2010 were issues on which the government's proof relied primarily either upon the testimony of cooperating witnesses who had everything to gain from implicating the defendant or upon the defendant's alleged post-arrest statement, which Agent Hermes chose on purpose not to record. It was the defendant's theory of the case that the nature and quality of this evidence created a reasonable doubt as to her guilt under count 1, because it was possible that she had not been involved in the conspiracy prior to it coming to an end in 2010. Under these circumstances, testimony offered to demonstrate her criminal propensity by proof of criminal activity which supposedly occurred in the 1990s would have been particularly damaging if the jury chose to disregard the Court's curative instruction and credit this evidence.

Dkt. No. 225 at 4. Further, Defendant Demers argues that "[w]hether the jury gave any weight to the Court's curative instruction is an open question. However, it is undeniable that the time taken up by counsel's closing statements and the Court's charge in this case ended up being considerably more than the time it took for the jury to reach its verdict." *Id.* As such, Defendant Demers contends that, "[u]nder these circumstances and in the absence of a reasonable explanation as to why Agent Hermes gave the testimony in the manner he did, it is respectfully submitted that

justice requires the Court to exercise its discretion and grant Ms. Demers a new trial on count 1 of the indictment." *Id.* at 4-5.

In response, the Government argues that when Defendant Demers elected not to seek a mistrial based on SA Hermes' testimony at trial, she waived her right to a mistrial. *See* Dkt. No. 233 at 8-9 (citing cases). Moreover, the Government contends that, notwithstanding the fact that Defendant Demers waived the right to a mistrial, the Court's curative instruction cured any alleged prejudice. *See id.* at 10-12. Finally, the Government asserts that, even if the testimony was not stricken, Defendant Demers is not entitled to a new trial because she has failed to demonstrate that "there is any basis for 'concern that an innocent person may have been convicted.'" *Id.* at 13 (quoting *McCourty*, 562 F.3d at 475).

Having reviewed the parties' submissions and the record in this matter, the Court finds that Defendant Demers' motion for a new trial must be denied. First, as the Government correctly argues, defense counsel expressly declined to seek a mistrial based on SA Hermes' testimony. Specifically, defense counsel stated as follows: "I don't want to ask for a mistrial, your Honor, because I'm – I think that in a lot of regards, you know, we're satisfied with the way the evidence has gone in in the case but it's – certainly damaging, there's no question about it, and I really have some concerns about that." Dkt. No. 233-1 at 23-24. Having expressly declined to move for a mistrial at trial, Defendant Demers has waived ability to do so upon conviction.

In *United States v. Tasis*, 696 F.3d 623 (6th Cir. 2012), the defendant argued that he was entitled to a new trial because the prosecutor violated *Doyle v. Ohio*, 426 U.S. 610 (1976) by cross-examining him at trial about whether he had ever spoken to law enforcement about the case for which he was on trial. *See id.* at 625. At trial, the defendant objected and the court gave the jury a curative instruction. *See id.* After granting the objection, the court even asked the

defendant's counsel if he wanted a curative instruction or if he wanted a mistrial, to which the defendant's counsel responded that a curative instruction would remedy the defect. *See id.* As such, the Sixth Circuit found that the district court answered the defendant's objection by issuing the curative instruction and, in refusing to move for a mistrial, waived his ability to do so. *See id.* at 625-26 ("He expressly declined to seek a mistrial and cannot now ask for one on appeal. Any contrary argument is forfeited, indeed waived") (citing *United States v. Budd*, 496 F.3d 517, 529 (6th Cir. 2007)); *see also United States v. El Herman*, 583 F.3d 576, 581 (8th Cir. 2009).

Defendant Demers argues that the cases cited by the Government are distinguishable in that the district "court either offered a mistrial or indicated that it was considering ordering a mistrial." Dkt. No. 236 at 1. Defendant's arguments are misplaced. Counsel specifically stated that he did not want to move for a mistrial, despite his objection to SA Hermes' testimony, because they were "satisfied with the way the evidence has gone in[.]" The Court granted Defendant Demers' objection, issued a curative instruction, and struck the objectionable testimony. Defendant Demers took a calculated risk by proceeding to verdict, despite the perceived objectionable testimony. By expressly declining to move for a mistrial, Defendant Demers has forfeited the right to do so upon conviction. *See El Herman*, 583 F.3d at 581.

Second, even if Defendant Demers had not waived her right to seek a mistrial, the Court's instruction to the jury cured any prejudice. "As the Supreme Court has frequently observed, the law recognizes a strong presumption that juries follow limiting instructions." *United States v. Snype*, 441 F.3d 119, 129-30 (2d Cir. 2006) (citations omitted). This presumption will be followed unless "'there is an overwhelming probability that the jury will be unable to follow the court's instructions and the evidence is devastating to the defense.'" *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 136 (2d Cir. 2008) (quotations omitted). "Stated

another way, we have found it inappropriate to presume that a district court's limiting instructions were obeyed when such instructions required jurors to perform 'mental acrobatics.'" *United States v. Becker*, 502 F.3d 122, 130 (2d Cir. 2007) (quotation and other citations omitted).

As mentioned, upon receiving counsels' input, the Court specifically instructed the jury as follows: "My preliminary instructions to you you'll probably remember I told you that if I instruct you to strike something from your minds, you must. I am instructing you to strike from your minds and from any consideration in this case the answer that the special agent gave. You may not consider that. I know it's hard to remove things from your brain but I'm instructing you that the answer is stricken and you must not consider that answer in this matter." Dkt. No. 233-1 at 26. Moreover, in the final instructions to the jury, the Court reminded the jury that "[y]ou may not consider any responses which I have ordered stricken from the record. I realize that you cannot remove those answers from your memories, but I instruct you that, as a matter of law, you may not rely on them during your deliberations." Dkt. No. 217 at 4.

Defendant Demers presents no credible arguments suggesting that the stricken testimony was "devastating to the defense." *In re Terrorist Bombings*, 552 F.3d at 136. Rather, Defendant Demers provides only speculation, arguing that "if the jury chose to disregard the Court's curative instruction and credit this evidence" it would be "particularly damaging." Dkt. No. 225 at 4. This bare speculation is insufficient to meet her burden. The Court's instruction was simple and straightforward, which did not require the jury to engage in any "mental acrobatics." *Snype*, 441 F.3d at 130 (citation omitted).

Further, the evidence in support of the conviction was overwhelming. At trial, the Government presented, among other things, the following evidence establishing Defendant Demers' long-running participation in the conspiracy: (1) the testimony of four co-conspirators

that Defendant Demers' was an active member of the conspiracy beginning in at least 2004; (2) Defendant Demers' own statements and actions in audio and video recordings that demonstrated that she was involved in the conspiracy for years prior to 2013; and (3) SA Hermes' testimony that Defendant Demers admitted in 2013 to smuggling and distributing marijuana with Ralph Dumas and Andrew Schueppel for the past "11 to 12 years." Nothing in the record supports Defendant Demers assertion that her involvement in the conspiracy ended in 2010.

Based on the foregoing, the Court denies Defendant Demers' motion for a new trial.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant Demers' motion for a new trial (Dkt. No. 225) is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: June 17, 2016
Albany, New York

Mae A. D'Agostino
U.S. District Judge